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In The

Supreme Court of the United States

October Term, 1994

AGRICULTURAL LABOR RELATIONS BOARD, J. ANTONIO BARBOSA, IVONNE RAMOS RICHARDSON, and LINDA A. FRICK,

Petitioners,

v.

BUD ANTLE, INC. dba BUD OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Anti-Injunction Act, 28 U.S.C. § 2283, pronibits federal courts from enjoining state administrative proceedings which are adjudicatory or quasi-judicial in nature.

2) Whether the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prohibits federal courts from deciding cases in which state proceedings are ongoing, implicate important state interests, and provide an adequate opportunity to raise federal questions.

3) Whether the preemption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), can be applied to proceedings of a state board which regulates agricultural labor, even though the parties to the proceedings can reasonably be said to be within the scope of the agricultural exemption of the Fair Labor Standards Act, and therefore outside the jurisdiction of the National Labor Relations Act.

4) Whether the National Labor Relations Act confers on private parties a right of action against state agencies alleging violation of the preemption principles recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

LIST OF PARTIES

Petitioners: Agricultural Labor Relations Board[1]; J. Antonio Barbosa, Executive Secretary of the ALRB; Ivonne Ramos Richardson, member of the ALRB; and Linda A. Frick, member of the ALRB. Bruce J. Janigian, Chairman of the ALRB, a defendant-appellee in the Court of Appeals, ended his term of office on March 1, 1995, and the office of Chairman of the ALRB is currently vacant.

Respondent: Bud Antle, Inc. dba Bud of California.

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[1] The Agricultural Labor Relations Board was not named as a party below, but it was clear that the Board was in fact a party to all of the proceedings: the four named defendants were the Executive Secretary of the Board and the three Board members sued personally and in their official capacities, and the Ninth Circuit referred to the defendants collectively as "the ALRB" (App. 3, n.1).

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Agricultural Labor Relations Board, J. Antonio Barbosa, Ivonne Ramos Richardson, and Linda A. Frick (hereinafter "petitioners" or "ALRB"), hereby respectfully request this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on January 17, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994), is reproduced in the Appendix (hereinafter "App.") at App. 1. The opinion of the United States District Court for the Northern District of California is reproduced at App. 41.

JURISDICTION

On September 9, 1994, the United States Court of Appeals for the Ninth Circuit issued its opinion affirming in part, reversing in part, and remanding the District Court's dismissal of the complaint. App. 1. Respondent timely filed a Petition for Rehearing, and on January 17, 1995, the Court of Appeals denied the petition. App. 1.[2] This Petition for Certiorari was filed within 90 days of that denial. This Court has jurisdiction to review, by way of writ of certiorari, the judgment or decree of the federal Court of Appeals. 28 U.S.C. § 1254(1).

[2] The Court of Appeals, in denying rehearing, reissued its entire opinion, although it was precisely the same as the original September 9 opinion, except for changes to footnote 11. These changes dealt with the § 1983 causes of action, which were remanded to the District Court. *See* Order at App. 2-3.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are 28 U.S.C. § 2283, 29 U.S.C. § 152(3), 29 U.S.C. § 203(f), and California Labor Code § 1140.4(b). The text of these statutes is reproduced at App. 54 through 55.

STATEMENT OF THE CASE

The California Agricultural Labor Relations Board (ALRB) is an independent state agency which was created in 1975 to administer a new statute governing relations between agricultural employees, labor unions, and agricultural employers in the State of California. This statute, the Agricultural Labor Relations Act (ALRA),[3] was enacted at a time when agricultural labor disputes had created unstable and violent conditions in the state and were a threat to California's agricultural economy. This labor strife was the product of the deliberate exclusion of farmworkers from the system of collective bargaining provided by the National Labor Relations Act (NLRA). California exercised its power to police agricultural labor relations by enacting the ALRA to fill the void left by Congress.

Closely modeled on the NLRA, but covering only agricultural employees excluded by that law, the ALRA authorizes the ALRB to hold elections and certify the results, adjudicate election misconduct and unfair labor practice charges, and issue decisions. In its 20 years of

[3] California Labor Code section 1140 et seq.

existence, the ALRB has issued 945 published, precedential decisions.

Bud Antle, Inc. (Bud or the Employer) is the largest volume producer of fresh vegetables in the United States. In 1976, the Fresh Fruit and Vegetable Workers (FFVW or the Union) were certified by the ALRB as the exclusive representative of Bud's cooler employees. Under that certification, the Union and the Employer negotiated four collective bargaining agreements between 1977 and 1986, each containing a "recognition" clause, in which recognition of the union was founded upon certification by the ALRB. In 1989, while the parties were negotiating a fifth agreement, a labor dispute erupted. Both parties filed charges with the ALRB.

While the General Counsel of the ALRB was investigating the Union's charges, and even though Bud had itself filed charges against the Union *with the ALRB*, Bud contended for the first time that operational changes it had instituted several years previously divested the ALRB of jurisdiction. In pursuit of this position, Bud filed a Petition for Unit Clarification with the National Labor Relations Board (NLRB) requesting that it designate Bud's cooler employees as non-agricultural and assume jurisdiction over them. On October 16, 1990, the Regional Director of the NLRB dismissed the petition as inappropriate. Bud appealed this dismissal, and the NLRB ordered the Regional Director to investigate.

While this investigation was ongoing, the General Counsel of the ALRB issued a complaint alleging that, beginning in 1989, Bud had violated the ALRA in a variety of ways, including unlawfully locking out

employees and refusing to bargain in good faith with the Union. Bud answered the complaint and denied that it was an agricultural employer. At Bud's request, the ALRB bifurcated the hearing on the complaint, in order to decide the question of jurisdiction first. Hearing commenced on April 16, 1991.

On May 1, 1991 the NLRB Regional Director issued a decision on the Unit Clarification, concluding that, as of February 1991, the cooler employees were not agricultural laborers and were thus covered under the NLRA. However, she specifically declined to make a determination regarding the status of the employees at any time prior to 1991, stating "[t]he effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts." In view of the Regional Director's decision, the ALRB went forward with its determination of jurisdiction.

On September 6, 1991, the Union filed with the NLRB the same charges it had filed with the ALRB, to protect itself in case the unit was found to be nonagricultural during the earlier period as well. On October 11, 1991, the NLRB Regional Director refused to issue a complaint on the basis that the charges were untimely.

Bud unsuccessfully sought to enjoin the ALRB proceedings in the U.S. District Court for the Southern District of California. On December 16, 1991, an Administrative Law Judge (ALJ) of the ALRB, after thoroughly examining the relationship between Bud and various other contracting entities, issued an interlocutory decision finding that Bud was a farmer under the FLSA

and that its cooler employees were covered by the ALRA. The ALJ concluded that even though Bud contracted with ostensibly independent growers to provide fresh produce, Bud in fact maintained so much control and operational oversight over these growers that it was engaged in a single integrated enterprise with them and, therefore, was an agricultural employer under the ALRA. On September 16, 1992, the ALRB affirmed his decision.

On October 20, 1992, Bud filed the instant action in the District Court for the Northern District of California, seeking an injunction and damages against the ALRB for acting in excess of its jurisdiction, the same relief it had unsuccessfully sought in the Southern District a year earlier. The Court, citing the abstention doctrine, declined to exercise jurisdiction. Bud's appeal followed and, upon review of the district court's decision, the Ninth Circuit held that abstention was not appropriate, and that the ALRB was preempted from hearing the case.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals addresses four important questions which have been left open by this Court, in ways that upset the balance between the state and federal adjudicatory processes. The first question involves interpretation of a statute – the Anti-Injunction Act – designed to keep federal courts from overreaching into the state's domain. The second involves a judicial principle – the abstention doctrine – intended to accomplish the same result. In both cases, the appellate court erroneously concluded that the district court was free to

intrude into the state proceedings. The third question – preemption of state jurisdiction – raises the important issue of how to draw the line between state and federal regulation of labor where the state has established a comprehensive regulatory scheme. The fourth question – private right of action – asks whether the party whose labor relations are being regulated has a right to have the federal court establish that line between state and federal regulation, or whether only the regulatory agency itself has that right. Each alone presents a question worthy of review, and all together provide overwhelming reasons for granting the petition.

I

THE ANTI-INJUNCTION ACT SHOULD BAR FEDERAL COURTS FROM ENJOINING STATE ADMINISTRATIVE ADJUDICATIONS

The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from enjoining state court proceedings unless the injunction may be justified by one of three statutory exceptions not material to this case. The rationale for the statute is based on the "essentially federal nature of our national government," and the desire to prevent needless friction between the state and federal court systems by clearly delineating the proper boundaries within which each system may function. *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). This rationale has equal force with respect to administrative bodies like the ALRB which are performing judicial functions, and the statute

should also be held to prohibit injunctions against quasi-judicial administrative proceedings.

In *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court suggested that the Act may apply to administrative agencies as well as courts:

> The District Court held § 2283 inapplicable in the present case because the plaintiffs sought an injunction against a state administrative body and not a state court. Whether this distinction is tenable in all circumstances – even where the administrative proceeding is adjudicatory or quasi-judicial in character – we need not decide here. . . .

411 U.S. at 573, n.12. With this language, the Court left open an important question, which has been given varying interpretations in the circuit courts, and which needs to be resolved.

The Ninth Circuit, in the decision below, suggested that every circuit deciding the question has held that the Anti-Injunction Act only limits a federal court's power over state *courts* and not other state entities. App. 22. In fact, decisions of the various circuits demonstrate inconsistency and confusion on this issue.

The Tenth Circuit, in *Armstrong v. Maple Leaf Apartments*, 508 F.2d 518 (10th Cir. 1974), stated that it was the nature of the function being performed, not the body, that determined whether the Anti-Injunction Act should apply. That court found that the state probate court in that case was not performing a state judicial function but a federal ministerial or administrative function. Hence, the court reasoned, the Anti-Injunction Act did not apply,

even though the proceeding was being conducted by a court. 508 F.2d at 523.

The Sixth Circuit, in *American Motors Sales Corp. v. Runke*, 708 F.2d 202 (6th Cir. 1983), held that the Anti-Injunction Act did not apply to a hearing before the Kentucky Bureau of Motor Vehicle Regulation, even under the suggestion in *Gibson*, because the hearing was "neither sufficiently adjudicative nor quasi-judicial in character that the question posed in *Gibson* must be answered." The Bureau's decision was "essentially an executive function; that is, administering the provisions of [a statute] as a licensing agency." 708 F.2d at 204, n.5.

The Second Circuit, in its only post-*Gibson* treatment of the issue, affirmed without opinion a district court decision which noted that the Act may be applicable to some quasi-judicial state administrative proceedings, but only if they are proceedings *in rem*, or the state agency has the power to enforce its own orders. *Town of Springfield, Vt. v. McCarren*, 549 F.Supp. 1134, 1150 (D.Vt. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983).

The Seventh Circuit, in *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 824 (7th Cir. 1990), is the only other circuit explicitly to agree with the Ninth Circuit that the Act applies only to courts.[4] But even in that case, like all of the cases described above, the issue

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[4] The Ninth Circuit also cites *Engelman v. Cahn*, 425 F.2d 954, 958 (2d Cir. 1969) and *Taylor v. Kentucky State Bar Ass'n*, 424 F.2d 478, 482 (6th Cir. 1970) in support of its position, but both of these cases were decided before *Gibson*, and therefore, obviously, could not have been influenced by it.

of a quasi-judicial or adjudicative administrative proceeding was not squarely presented. The instant case is the first since *Gibson* in which precisely the situation referred to in the *Gibson* footnote is presented.

Just as this Court has held that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), applies to state administrative proceedings so long as they are "judicial in nature" (*New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989)), this Court should follow through on its suggestion in *Gibson* and hold that the Anti-Injunction Act applies to quasi-judicial administrative proceedings. The same federal infringement that Congress sought to avoid with respect to state courts will occur as a result of enjoining administrative proceedings, and the potential for mischief is illustrated by the instant case, where it will mean that the unfair labor practice charges will never be litigated in any forum.

The ALRB is an administrative body vested with judicial power. *Perry Farms, Inc. v. ALRB*, 150 Cal.Rptr. 495 (1978). It performs judicial functions, by investigating, declaring, and enforcing liabilities based on existing facts and laws.[5] Indeed, the Ninth Circuit itself has held that ALRB adjudications are "judicial in nature." *Fresh Intern. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1357 n.3 (9th Cir. 1986). The ALRB stands in the shoes of a California trial court, since its decisions are reviewed

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[5] This Court defined a judicial inquiry in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), as one which "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." 211 U.S. at 226.

directly by the California courts of appeal, and the trial courts have no jurisdiction to review them. Cal. Labor Code § 1160.8; *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.*, 595 P.2d 579 (1979). Therefore, the ALRB should be treated like a court under the Anti-Injunction Act and be free from federal court intervention.

II

IN REFUSING TO ABSTAIN, THE NINTH CIRCUIT MISCONSTRUED THIS COURT'S PRECEDENT ON *YOUNGER* ABSTENTION

The doctrine enunciated in *Younger v. Harris, supra,* requires a federal court to abstain when there is an ongoing state proceeding, which implicates important state interests, and provides an adequate opportunity to raise federal questions. *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986). In *New Orleans Public Service, Inc. v. Council of the City of New Orleans (NOPSI), supra*, 491 U.S. 350, this Court held that abstention is required even in the face of a *substantial* claim that the state action is completely preempted by federal law. *Id.* at 364-65. However, *NOPSI* left open the question of whether a *facially conclusive* claim of preemption would vitiate the need for abstention and allow immediate federal court interference. *Id.* at 366-367. This Court should grant this petition to decide this important issue. As explained below, a claim of federal preemption, even one which is deemed to be "readily apparent" or "facially conclusive," may warrant a refusal to abstain only where circumstances indicate that there is little or no possibility

that the claim will be properly addressed in the state court system.

The decision below, applying the three-part test established in *Dayton*, found that the first and third elements were satisfied: the state proceedings were ongoing, and they provided an adequate opportunity to raise federal questions. However, the court found there was no important state interest, despite its explicit recognition in an earlier case that California's interest in protecting the collective bargaining process through enforcement of the ALRA *is* an important state interest. *Fresh Intern. v. Agricultural Labor Relations Bd., supra*, 805 F.2d at 1359-60. The basis for finding no important state interest was the court's view that federal preemption was "readily apparent." The Ninth Circuit has made clear its view that the "readily apparent" standard, as well as its application to the present case, comports with the exception identified in *Younger* for statutes that are "flagrantly and patently violative" of the Constitution. *Id.* at 1361, n.12.[6] This erroneous resolution of the very question this Court left open in *NOPSI* is inconsistent both with the purposes underlying *Younger* abstention and with this Court's prior

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[6] The Ninth Circuit frequently bases its decisions not to abstain on a finding of "no important state interest," despite the presence of a very significant state interest. *See, e.g., Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 431 (1994)(enforcement of state liquor laws); *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402, 408-09 (1994)(enforcement of state gambling laws).

Petitioners have been informed that a petition for certiorari was filed with this Court on March 15, 1995, in *Fort Belknap*, and that this issue will be presented in that case.

statements regarding the narrow exceptions to the doctrine.

As recognized by this Court in *Younger*, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger, supra*, 401 U.S. at 45. This principle of non-intervention is based on the doctrine that a court of equity should not issue an injunction unless the moving party has no adequate remedy at law and will suffer irreparable injury absent such relief. *Id.*, at 43-44. Moreover, this principle is:

> reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

(*Id.*, at 44.)[7]

Thus, a federal court may properly refuse to abstain in only rare and limited circumstances. In view of the fundamental policy against federal interference with state

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[7] While *Younger* involved state criminal proceedings, subsequent decisions have extended the underlying rationale to civil actions, including state administrative proceedings which are judicial in nature, particularly those such as the one at issue here where a state has initiated the proceedings in order to vindicate an important public policy. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., supra*, 477 U.S. 619; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

proceedings, even irreparable injury is insufficient unless it is both "great and immediate." *Id.*, at 46. The cost, anxiety, and inconvenience of having to defend against an action in the state courts does not constitute irreparable injury. *Ibid.* In the present case, the only "injury" Bud can assert that would result from federal court abstention is that the ALRB's decision will be reviewed in the first instance by the state courts where – just as it did before the ALRB – Bud may raise its defense of federal preemption. Bud can demonstrate no harm from this route. Not only is abstention warranted in these circumstances, but its application illustrates one of the underlying precepts of abstention doctrine, *i.e.*, respect for the integrity of the state courts.[8]

In *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the Court unambiguously held that the *Younger* doctrine limits intervention by the federal courts, whether the state proceeding be criminal or civil, only to those circumstances where the state proceeding is found to be motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." *Huffman, supra*, 420 U.S. at 611. The Ninth Circuit in the instant case held that it was proper to

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[8] As this Court noted in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975), state court judges are bound to abide by the federal constitution, and permitting a claimant to avoid exhaustion of the state system in favor of the federal courts would require the federal courts to assume that state judges will not be faithful to their constitutional responsibilities.

refuse to abstain based on the "flagrantly and patently violative" standard, which, in its view, equates to a claim of "readily apparent" preemption. However, other statements by this Court construing the exceptions to *Younger* abstention counsel against such an interpretation.

In *Younger* itself, this Court explained that abstention is required even where there is a showing that a state statute on its face abridges federal constitutional rights. *Younger, supra,* 401 U.S. at 52-54. This holding was expressly affirmed in *Huffman, supra,* 420 U.S. at 602. If a facially unconstitutional state statute does not provide sufficient grounds for federal intervention, such intervention is even less appropriate where federal preemption of a state adjudicatory proceeding is found to be merely "readily apparent."[9] A state adjudication which results in an isolated intrusion into an exclusive federal domain presents a less serious conflict with federal supremacy than does a facially unconstitutional statute. Thus, the Court in *Younger* and *Huffman* indicated the answer to the question it left open in *NOPSI;* the logical implication of these earlier holdings is that a facially conclusive claim of preemption is *not* sufficient to render abstention inappropriate.

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[9] Indeed, respect for the integrity of the state courts requires that state appellate courts be trusted to correct any mistakes of law made by lower courts. Therefore, the Ninth Circuit's "readily apparent" preemption standard, which would allow federal intervention based on nothing more than a good faith but erroneous application of federal law by a lower state court, is antithetical to the policies underlying the abstention doctrine.

Since facial invalidity does not satisfy the standard of "flagrantly and patently violative of express constitutional prohibitions," there remains the question of what does meet this standard. The *Younger* abstention doctrine is based on principles of federalism and comity, in particular, respect for the integrity of state courts in applying both state and federal law. It follows that exceptions to this doctrine would involve situations where the integrity of the state proceedings is brought into question, as opposed to the situation herein where the lower court simply believes that the ALRB, which is analogous to a trial court, has incorrectly decided the federal question.

Indeed, in *Younger*, this Court explained that federal intervention was appropriate in an earlier case, *Dombrowski v. Pfister*, 380 U.S. 479 (1965), only because that case involved allegations that the state prosecutions were brought not with the intention of securing valid convictions, but for the purpose of harassing and intimidating the appellants in their attempt to vindicate their constitutional rights. *Younger, supra*, 401 U.S. at 48-49. Thus, the very integrity of the state proceedings was called into question, jeopardizing the ability of the appellants to have their federal claims fairly heard in the state courts. Similarly, the "flagrantly and patently" unconstitutional exception must refer to situations where there is little or no possibility of having federal constitutional rights properly addressed and vindicated in the state courts.

Applying these principles to the present case yields but one possible result. The interruption of state proceedings by the lower court simply cannot be squared with either the purposes underlying *Younger* abstention doctrine or the narrowness of this Court's articulation of the

exceptions to that doctrine.[10] Not only are the proceedings before the ALRB incomplete,[11] but, more importantly, the normal avenue of review by the state appellate courts has been foreclosed, even though there is no claim that Respondent's federal preemption defense will not be properly addressed through such review. Indeed, there is no claim that by passage of the ALRA, the State of California has impermissibly attempted to assert jurisdiction over employees subject to the jurisdiction of the NLRB. To the contrary, the ALRA specifically excludes any employees under the NLRB's jurisdiction. The only claim is that the ALRB has in this one instance incorrectly interpreted the murky and uncertain parameters of "agriculture" in asserting jurisdiction over Respondent for a time period prior to the assertion of jurisdiction by the NLRB. If indeed the ALRB has erred in this regard, the state courts are both competent and available to evaluate the ALRB's decision in light of principles of federal preemption.

The present case also raises the novel issue of whether a federal court may refuse to abstain for the

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[10] The arguments made here with regard to the parameters of *Younger* abstention doctrine are independent of the arguments made in part III of this petition with regard to the application of *Garmon* preemption. Acceptance of the ALRB's arguments concerning preemption would, of course, make abstention by the federal courts all the more appropriate in the present circumstances.

[11] The ALRB has not ruled on the merits of the unfair labor practice complaint, as the federal court injunction was issued soon after the ALJ's recommended decision on the merits was appealed to the full Board.

professed purpose of vindicating federal interests, when the federal agency authorized to guard those interests – in this case the NLRB – has itself expressed the view that the matter should proceed through the state court system.

The NLRB first expressed its view on this question in a unit clarification decision issued by the Regional Director for Region 21 of the NLRB on May 1, 1991. In footnote 15, at page 20, the Regional Director stated, in pertinent part:

> The clarification made herein is only as of the date of the hearing herein. I specifically decline to make the declaration requested by the Employer-Petitioner as to its status in 1989. . . . The effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts.

The NLRB again addressed this issue in an amicus curiae brief to the Ninth Circuit, filed at the court's request to answer certain questions posed by the court. In that brief, the NLRB unequivocally asserted that abstention was appropriate because the present circumstances did not fall within one of the acknowledged exceptions to *Younger* abstention doctrine. Brief For The National Labor Relations Board As Amicus Curiae, at 14-16. As part of its analysis, the NLRB again expressed the view that the federal preemption issues would more appropriately be addressed in the first instance by the ALRB and the state reviewing courts.

The lower court's invocation of an exception to the *Younger* abstention doctrine is based on the conclusion

that federal interests underlying *Garmon* preemption[12] override the important state interest in providing and protecting collective bargaining rights for agricultural employees. *Garmon* preemption is based in large measure on the fact that Congress has entrusted to a specialized administrative agency, the NLRB, the development of a unified body of federal labor law. *See Garmon*, 359 U.S. at 242-43. In other words, this preemption doctrine is designed to protect a far-reaching federal labor policy, of which the guardian is the NLRB. It therefore defies logic to conclude, as did the lower court, that the *Garmon* preemption doctrine trumps the important policies of nonintervention that underlie the *Younger* abstention doctrine when the NLRB itself has twice expressed the view that its jurisdiction is not threatened by federal court abstention in the present case and that it is appropriate for the matter to proceed through the state court system.

III

THE DOCTRINE OF *GARMON* PREEMPTION SHOULD NOT APPLY WHEN THERE IS A COMPREHENSIVE STATE REGULATORY SCHEME OF INTERESTS DEEPLY ROOTED IN LOCAL FEELING AND PERIPHERAL TO THE NLRA

Garmon preemption prohibits the states from regulating activities that are at least arguably protected by section 7 or arguably prohibited by section 8 of the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236

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[12] "*Garmon* preemption," of course, refers to the principles articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

(1959). The court below found that the ALRB proceeding was preempted because Bud's employees were at least arguably not agricultural laborers, and therefore the unfair labor practices charged were at least arguably prohibited by the NLRA.

The Ninth Circuit's decision has serious implications for our federal system because California entered the field of agricultural labor relations precisely because Congress deliberately left regulation of agricultural labor relations outside the power of the national Board. If allowed to stand, the decision will undermine California's comprehensive system of agricultural labor relations, affecting approximately one million men and women who annually perform agricultural labor in California.

Having accepted Congress' invitation to exercise its power to police agricultural labor relations, and having committed resources to establishing a specialized agency to oversee them, the State of California has now been told that its state labor agency lacks the power to determine whether Bud unlawfully refused to abide by the obligations created by its certification of representative under which the Union and the Employer have negotiated four collective bargaining agreements.

Under the reasoning of the court below, thousands of farmworkers, excluded by deliberate act of Congress from the coverage of the national Act, and protected in their activities only by the ALRA, may have rights without remedies as agricultural employers under the ALRA move out of the reach of state jurisdiction merely by

changing their contractual relationships without altering their essential method of operations.

The court below erred in mechanically concluding that the ALRB was preempted, without balancing the respective strengths of the federal and state interest in regulating what is both arguably agricultural and arguably non-agricultural. This Court has said a balance must be made.

> Our approach to the preemption issue has thus been stated and restated. First, we determine whether the conduct that the State seeks to regulate . . . is actually or arguably protected or prohibited by the NLRA. Although the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion," if the conduct at issue is arguably prohibited or protected otherwise applicable state law and procedures are ordinarily pre-empted. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act, we refuse to invalidate state regulation. . . .

Local 926, Operating Engineers v. Jones, 460 U.S. 669, 676 (1983), citations omitted.

For the reasons stated below, the ALRB's assertion of jurisdiction over Bud is not only of mere peripheral interest to the national Act, but also touches on interests so deeply rooted in local feeling that *Garmon* pre-emption does not apply.

The ALRA was enacted in response to a sustained period of conflict between farmworkers and employers

and between rival unions which, in the absence of a system requiring recognition of representatives for collective bargaining purposes, led to violence and bloodshed in California's fields. The preamble to the ALRA reflects this purpose: "This enactment is intended to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state."

The ALRA was deliberately crafted so as to cover only those employees excluded by Congress from the NLRA. The ALRA provides that the term "agricultural employee" only includes those employees excluded from the coverage of the NLRA as agricultural employees. The two boards operate in what, on the face of their respective enactments, are parallel worlds: "The NLRA excludes from coverage anyone who fits the Fair Labor Standards Act definition of an agricultural employee. The ALRA . . . extends its coverage to all persons excluded from the NLRA. This approach would appear to be perfectly balanced: what the NLRA excluded, the ALRA included, both relying on the Fair Labor Standard definition."[13]

Although the problem of drawing the line between who is and who is not an agricultural employee is inherent in any regulatory scheme, the problems presented by incorporation of the Fair Labor Standards Act (FLSA) definition into both statutes are particularly acute because of the nature of the FLSA definition which marks the boundary line between the two Acts. App. 54-55.

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[13] Levy, *The Agricultural Labor Relations Act of 1975 – La Esperanza de California Para El Futuro*, 15 Santa Clara Lawyer 783, 786 (1975).

Some of the specific practices described, such as "cultivation and tillage of the soil," and the "production, cultivation, growing and harvesting of any agricultural" commodity, are agriculture in its "primary" sense. Other practices which, not themselves farming in the "primary" sense, but which are performed "by a farmer or on a farm in conjunction with such farming operations" are agriculture in its "secondary" sense. *See Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63 (1949). Under this complex definition, "Congress has cast upon [tribunals] the duty of making distinctions that often are bound to be so nice as to appear arbitrary in relation to each other. A specific situation . . . presents a problem for construction which may with nearly equal reason be resolved one way rather than another." *Id.* at 770 (Frankfurter, J., concurring).

In this case, the ALRB has reasonably determined that Bud is a farmer because it and the contract growers it hires are a single integrated enterprise. Its conclusion is based on a long line of NLRB cases applying that test in various other circumstances to determine if two or more entities are independent of one another. *See, e.g., N.L.R.B. v. Carson Cable TV*, 795 F.2d 879 (9th Cir. 1986); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902 (9th Cir. 1964), *cert. den.* 379 U.S. 961 (1965); *Parklane Hosiery Co.*, 203 NLRB 597 (1973).

Moreover, the ALRB's analysis also relied upon various circuit courts which found that the use of contract growers did not change the essential character of the primary enterprise and refused to enforce NLRB orders that held such employees non-agricultural. *N.L.R.B. v.*

Ryckebosch, Inc., 471 F.2d 20 (9th Cir. 1972); *N.L.R.B. v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969).[14]

Because Congress chose to exclude agriculture from the NLRA, and because the question of what constitutes agriculture under the FLSA is so problematic, an "employer" whose status under the national Act presents a borderline case for inclusion in the national scheme cannot be said to fall within the "clearly indicated policy of industrial relations." Therefore, *Garmon* preemption should not apply. In other words, the indefinite region of secondary agriculture simply cannot be said to constitute an arena of "conduct *so plainly within the central aim of federal regulation*" that there is any potential for "frustration of [the] national purpose." *Garmon, supra*, 359 U.S. at 244. Moreover, because the ALRA was enacted to regulate the strife and violence which flowed directly from Congressional indifference to what took place in the fields, the regulation of all that is arguably agriculture must be considered one of those interests so deeply rooted in "local feeling and responsibility that, in the absence of

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[14] This Court's decision in *Bayside Enterprises, Inc. v. N.L.R.B.*, 429 U.S. 298 (1977), did not overrule either of these cases. *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980). Although *Bayside* deferred to the NLRB's construction of the FLSA exemption, the Court ultimately upheld the NLRB's decision because it found that the work at issue was incidental to the portion of Bayside's operations that were clearly commercial in nature. The Court opined that the issue might with nearly equal reason be resolved either way. 429 U.S. at 302. In the instant case, while Bud might "arguably" be an employer under the NLRA, it is also with equal reason an agricultural employer under the ALRA.

compelling congressional direction," (*Local 926, supra*, 460 U.S. at 676) it cannot be inferred that Congress has deprived the states of the power to act.

In *Bethlehem Steel Co. v. New York Labor Bd.*, 330 U.S. 767 (1947), this Court indicated that when it is clear that Congress did not intend to cover the subject matter, state jurisdiction would be prevented only in cases of actual conflict. In that case, the Court considered whether New York's so-called little Wagner Act was preempted by the national Act when the state act permitted organization of foremen at a time when the national Act was interpreted as forbidding such organization. While the Court did find preemption in that case, critical to its finding was the fact that Congress had clearly given the NLRB jurisdiction over the industry in which the particular organization of foremen was sought:

> Whatever constitutional issues may have been presented by the earlier phases of the evolution of the federal policy in relation to the states, Congress having undertaken *to deal with the relationship between these companies and their foremen*, the State is prevented from doing so.

Id. at 771, emphasis added. Where the states are free to act, only where "the power of the state [becomes] an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will their authority be preempted. This is so because "the mere fact of delegation to deal with the general matter . . . [will not] preclude any state action *[unless] it is clear that Congress has intended no regulation except its own.*" *Id.* at 773, emphasis added.

The Ninth Circuit decision relied on *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), but that reliance was misplaced: *Davis* does not stand for the general proposition that the NLRA ousts state jurisdiction over anyone arguably subject to it. Like any *Garmon* preemption case, *Davis* focuses on the question whether the activity (in that case, the firing of a supervisor) is prohibited under section 8, not whether Davis' employer was subject to the Act in the first place. Indeed, there was no question that the NLRB had jurisdiction over Davis' employer.

The applicability of the *Garmon* preemption doctrine to a situation where there is a comprehensive state regulatory scheme such as the ALRA has not been previously addressed by this Court. It is an important question of federal law which should be settled by this Court.

IV

NO PRIVATE RIGHT OF ACTION SHOULD BE FOUND IN THE NLRA TO ENJOIN STATE PROCEEDINGS ON THE BASIS OF *GARMON* PREEMPTION

The instant case was initiated in the district court by the employer to enjoin the ALRB proceeding as preempted under the *Garmon* doctrine. The Ninth Circuit held that a private party may bring an action in federal district court seeking injunctive relief on the basis of *Garmon* preemption. However, since the NLRA contains no such right, only the NLRB itself is authorized to seek such an injunction, and if it chooses not to do so, private parties should not have standing. The purpose of *Garmon* is to assure the uniform application and unhampered

operation of a single federal scheme of labor relations law. This federal scheme is administered by the NLRB, and piecemeal litigation by private parties can hardly achieve that purpose.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court described four factors to be considered in determining whether a private remedy is implicit in a statute not expressly providing one: (1) Does the statute create a federal right in favor of the plaintiff; (2) is there any indication of legislative intent, express or implied, to create or deny a remedy; (3) is it consistent with the underlying purpose of the legislative scheme to imply such a remedy; and (4) is the cause of action one traditionally relegated to state law.

Legislative intent, as reflected in the second and third tests in *Cort v. Ash*, is now considered to be determinative. "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241, (1979). "[R]ecognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991), citation omitted. As then Judge Scalia explained: "[The] existence [of standing] in a given case is largely within the control of Congress." Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suff.U.L.Rev. 887 (1983).

Under this approach, the inquiry is whether it is consistent with the intent of Congress, in the jurisdictional language it enacted, for a private litigant to be able to raise the preemption issue. The thrust of *Garmon* is protection of a uniform scheme of labor relations. There is no language in the NLRA, explicit or implicit, indicating that Congress intended to confer a right of action on private parties to assert the NLRB's jurisdiction, particularly where, as here, the NLRB was aware of the state proceeding and explicitly took no action to assert its jurisdiction.

The existence *vel non* of a private right of action challenging state regulation of labor relations, in areas in which Congress did not grant the NLRB the exclusive jurisdiction assumed in *Garmon*, is an important question of federal law which has not been addressed by this Court. Therefore, the petition should be granted so that this issue can be decided.

CONCLUSION

The four important principles discussed herein should bar federal courts from encroaching on state proceedings such as those conducted by the ALRB. Each alone presents a question worthy of review, and taken all together, they provide overwhelming justification to grant certiorari in this case.

DATED: April 13, 1995

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BUD ANTLE, INC., dba BUD OF CALIFORNIA, *Plaintiff-Appellant,* v. J. ANTONIO BARBOSA personally and in his official capacity as Executive Secretary of the California Agricultural Labor Relations Board; BRUCE J. JANIGAN, personally and in his official capacity as Chairman of the California Agricultural Labor Relations Board; IVONNE RAMOS RICHARDSON, personally and in her official capacity as a member of the California Agricultural Labor Relations Board; and LINDA A. FRICK, personally and in her official capacity as a member of the California Agricultural Labor Relations Board, *Defendants-Appellees.*	Nos: 93-15002 93-15642 93-15652 D.C. No. 92-20666 JW (PVT) ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submission Deferred March 15, 1994
Submitted August 29, 1994
San Francisco, California

Filed September 9, 1994
Amended January 17, 1995

Before: Herbert Y.C. Choy, Stephen Reinhardt, and Edward Leavy, Circuit Judges.

Opinion by Judge Reinhardt

COUNSEL

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ORDER

The petition for rehearing is denied.

The opinion filed September 9, 1994 is ordered amended as follows.

At Slip op. 10789 n.11, change the first full paragraph to read:

Four of the company's six causes of action potentially involve theories other than *Garmon* preemption, We conclude that the district court properly dismissed the company's third and sixth causes of action. However, the district court's dismissal order makes no mention of the fourth and fifth causes of action. Therefore, we remand these two claims to the district court for its consideration.

At Slip op. 10789 n.11, delete the third paragraph.

OPINION

REINHARDT, Circuit Judge:

This case involves several complicated questions regarding the preemptive effect of the National Labor Relations Act ("NLRA" or "the Act"). Bud Antle, Inc., ("Bud" or "the company") appeals the district court's Rule 12(b)(6) dismissal of its action against the members and executive secretary of the California Agricultural Labor Relations Board ("ALRB" or "state board").[1] The company claims that the National Labor Relations Act ousts the ALRB of jurisdiction to adjudicate various unfair labor practice charges which are now pending before the state board. It seeks injunctive relief to prohibit the ALRB from continuing its proceedings. The district court concluded that the NLRA does not preempt ALRB jurisdiction over the charges. It also held that it was required to abstain pursuant to *Younger v. Harris*, 401 U.S.

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[1] Although the ALRB itself is not a named party to this action, we will refer to the defendants collectively as "the ALRB."

37 (1971). Bud challenges both of these decisions on appeal, and we reverse.

I.

The ALRB, a state agency, is organized in a similar manner to the NLRB. It administers a statute (the Agricultural Labor Relations Act, or ALRA) that, in its form but not its scope, is nearly identical to the NLRA. For purposes of this case, there is only one difference, fundamental as it is, between the NLRA and the ALRA: the NLRA expressly *excludes* "agricultural laborers" from coverage, *see* 29 U.S.C. § 152(3), while the ALRB applies *only* to agricultural employees excluded from NLRA coverage. *See* Cal. Labor Code §§ 1140.4, 1148. This case revolves around several unfair labor practice charges which were filed against Bud and are currently pending before the state board. These charges arose from a dispute which occurred during 1989 contract negotiations between Bud and Local 78-B of the Fresh Fruit and Vegetable Workers ("FFVW" or "the union"), the representative of Bud's employees who handled or processed agricultural goods at several cooling facilities in California ("the bargaining unit"). The basic question is whether as of 1989 the employees involved were agricultural laborers who were clearly excluded from coverage under the NLRA. Only if they were not actually or arguably covered under that act, would they have been subject to the jurisdiction of the ALRB.

Bud markets about 40 million cartons of fresh vegetables each year, giving it the largest volume of any producer of fresh vegetables in the United States. At one

time, the company functioned as a fully integrated operation and used its own employees and equipment to grow, harvest, cool, pack, transport and market the crops it produced. However, beginning in approximately 1981 or 1982, it began to change its mode of operation by divesting itself of its primary growing operations. Bud has turned instead to a variety of contracting-out arrangements in order to secure produce for marketing. Under these arrangements, the company agrees with independent growers to purchase crops raised on the growers' land.[2] Although Bud oversees various aspects of the growers' operations and may participate in transplanting and harvesting crops, the growers are responsible for cultivation and often bear the risk of any crop failure during the growing season. The company relied more and more heavily on these arrangements throughout the 1980s, and it grew its last crop in 1989. Thus, it now relies exclusively on these contracting-out practices to obtain its products.

The unfair labor practice charges in this case involve employees in Bud's cooling facilities. These facilities are located away from the farms on which the produce is grown. The ALRB certified the union as the exclusive representative of the bargaining unit employees in 1976. Between 1976 and 1986, Bud and the union negotiated four collective bargaining agreements. Each collective bargaining agreement expressly based recognition of the union on the ALRB certification.

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[2] Approximately thirty to forty thousand acres are involved in these programs, of which only 1,232.44 acres are owned by Bud; the Bud-owned land is leased to various growers.

On March 31, 1989, the final collective bargaining agreement between Bud and the union expired. Although the company and the union actively negotiated for a new contract, negotiations broke down over the summer. On August 28, 1989, the union went on strike. The company responded by unilaterally implementing its "last and final offer" on September 11, and then locking out the striking employees and hiring replacements nine days later. During this time, the company filed with the state board five sets of unfair labor practice charges against the union. In one instance, it invoked the assistance of the ALRB to obtain a temporary restraining order against what it alleged was unlawful secondary picketing.[3]

The union also filed unfair labor practice charges with the ALRB. The issue before us is whether the state board has jurisdiction to adjudicate these charges. Seven sets of charges are involved. They were filed between September 1, 1989 and June 15, 1990. In those charges, the union alleged that Bud had committed numerous violations of the ALRA over the period from February of 1989 to August of 1990. The bulk of the violations allegedly occurred during the breakdown of negotiations in the summer of 1989.[4] The ALRB began investigating the

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[3] All of these charges were subsequently withdrawn or dismissed without further proceedings.

[4] The charges included allegations that (1) Bud had engaged in surface bargaining from June 6 through August 30, 1989; (2) Bud refused to supply the union with necessary information in March, May and June of 1989; (3) Bud failed to bargain over subcontracting of unit work in February and December of 1989, as well as January of 1990; (4) Bud made unilateral changes in benefit programs in October and November of 1989;

union's charges, but it did not place them on the same expedited schedule as the company's secondary picketing charges.

On December 18, 1989, the company for the first time raised a question regarding the ALRB's authority in a letter to the ALRB's Regional Field Examiner. Bud invoked NLRB jurisdiction for the first time on January 18, 1990, when it filed unfair labor practice charges with the Board against the union.[5] However, the company did not formally challenge ALRB jurisdiction until April 17, 1990, in a letter to the Salinas ALRB Regional Director. The letter stated that the company had come to realize that "none of the employees working at the Company's cooling facilities can be agricultural employees under the Agricultural Labor Relations Act," because their work was too attenuated from agricultural activity to be exempt from the NLRA.

Despite Bud's challenge, the ALRB continued its investigation and prosecution of the union's charges against Bud. The company responded by seeking a remedy in the NLRB. On September 7, 1990, Bud filed a unit

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(5) Bud implemented its "last and final offer" without impasse on September 11, 1989; (6) Bud illegally locked out union employees on September 20, 1989; and (7) Bud refused to honor the union's unconditional offer to return to work beginning November 15, 1989.

[5] These charges, like the earlier ALRB charges, alleged that the union had engaged in illegal secondary picketing and bad faith bargaining. The union responded to the charges by claiming that the NLRB lacked jurisdiction. Eventually, Bud's NLRB charges were either withdrawn or settled. However, the Union reserved its challenge to NLRB jurisdiction.

clarification petition with the Board. That petition sought a determination that the employees at the company's California cooling facilities were not "agricultural laborers" exempt from the Act. Although the Regional Director initially dismissed this petition, the Board ordered it reinstated and granted the ALRB amicus curiae status in the unit clarification proceeding.[6]

On January 7, 1991, two weeks after the Board reinstated the unit clarification petition, on January 7, 1991, Bud filed a motion with the ALRB to hold the complaint in abeyance pending resolution of the jurisdictional issues currently before the NLRB. The ALRB's Executive Secretary denied this motion three weeks later. Because the NLRB unit clarification proceedings involved only the *current* status of the bargaining unit employees, while the ALRB unfair labor practice proceedings involved the employees' status *as of 1989,* the state board concluded that the actions were not duplicative. The ALRB denied Bud's request for review of the Executive Secretary's decision on March 1, 1991.

Thwarted in its earlier attempts to force the state board to suspend its proceedings, Bud sought relief in federal court. On March 7, 1991, the company filed an amended complaint in the United States District Court for the Southern District of California. This complaint sought declaratory and injunctive relief to prevent the

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[6] After Bud had filed its unit clarification petition, the state board sought an advisory opinion from the NLRB regarding the status of Bud's cooling employees. Because of the pendency of the unit clarification proceedings, the NLRB denied the request for an advisory opinion.

state board from proceeding with the charges against Bud, as well as damages. The company requested a preliminary injunction against the ALRB, but the district court denied this motion on April 11, 1991.

On May 1, 1991, the NLRB Regional Director issued a decision on Bud's unit clarification petition. The Regional Director concluded that, as of the hearing on the petition, the bargaining unit employees were not "agricultural laborers," and thus were covered by the NLRA. However, the Regional Director specifically declined to make a determination regarding the status of the employees at any time prior to the date of the hearing. She explained her decision with the following footnote 15:

> The clarification made herein is only as of the date of the hearing herein. I specifically decline to make the declaration requested by the Employer-Petitioner as to its status in 1989. The Employer-Petitioner cites no case authority which mandates such a finding by me, and I conclude that it is inappropriate in the present proceeding.
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> In addition, the record reflects that on November 2, 1989, the ALRB (which was granted *amicus curiae* status in the instant proceeding by the Board's December 24, 1990, Order), issued a Notice of Hearing and Complaint, alleging that the Employer-Petitioner had engaged in certain unfair labor practices under the Agricultural Labor Relations Act of the State of California. Apparently, a hearing before the ALRB was commenced on April 16, 1991, in which the Employer-Petitioner contends that it is not under the ALRB's jurisdiction. The effect of the clarification herein on the proceedings

> before the ALRB should be determined by the ALRB and the reviewing courts. Thus, the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not appropriately addressed herein.

Following the Regional Director's decision, the company sought in the Southern District a temporary restraining order against the ALRB's prosecution of the unfair labor practice proceedings. On May 13, 1991, the district court denied the application. The court stated that the ALRB was "competent to decide the jurisdictional issue." It also noted that the NLRB had failed to exercise its power to seek injunctive relief against the ALRB: "Where the NLRB does not act to protect its own jurisdiction, this court will not interfere with the proper activity of a competent state tribunal." No further proceedings of substance occurred in the Southern District action. On August 28, 1991, the company and the ALRB stipulated to the dismissal of the complaint. The complaint was dismissed without prejudice except to the extent that it was "based on allegations of collusion, improper contact and/or prejudicial conduct" between the ALRB and its General Counsel.

Somewhat tardily, the union filed an unfair labor practice charge with the NLRB on September 6, 1991. This charge raised essentially the same claims as the ALRB charges. The Regional Director refused to issue a complaint, and the Board affirmed that decision. The members concluded that the union's charges were barred by the NLRB's six-month statute of limitation.

However, the ALRB proceedings continued. On December 16, 1991, the ALRB Administrative Law Judge

issued a recommended interlocutory decision on the issue of the state board's jurisdiction.[7] The Administrative Law Judge concluded that Bud was a farmer and that its cooling employees were agricultural employees exempt from the NLRA. Thus, he held that the ALRB had jurisdiction to adjudicate the unfair labor practice claims. The ALRB affirmed the Administrative Law Judge's decision, and the California Court of Appeal dismissed Bud's petition for review.

On October 20, 1992, five days after its setback in the state Court of Appeal, Bud again sought immediate federal court review. This time, it filed in the District Court for the Northern District of California. In the Northern District action, which is the one now before us, Bud asserted six causes of action, most of which alleged that NLRA preemption displaced ALRB jurisdiction over the unfair labor practice charges.[8] The complaint sought declaratory and injunctive relief against the pending

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[7] The state board had earlier bifurcated the proceedings so that the jurisdictional issue would be considered before the merits.

[8] The complaint raised the following claims: (1) that the NLRB preempted the ALRB's jurisdiction over the unfair labor practice charges; (2) that the court should order the ALRB to apply federal law standards in determining whether workers are "agricultural employees"; (3) that the NLRB preempted the ALRB's remedial authority; (4) that the ALRB had deprived Bud of rights under the NLRA by engaging in ex parte contacts with its General Counsel; (5) that the ALRB had deprived Bud of the constitutional right to due process by engaging in such contacts; and (6) that the ALRB had violated the ALRA by taking jurisdiction of the unfair labor practice proceedings.

ALRB proceedings, as well as damages against the individual defendants.[9] Each party soon filed dispositive motions. On November 9, 1992, the ALRB moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). On January 8, 1992, Bud sought partial summary judgment on its declaratory and injunctive relief claims. When the ALRB filed its opposition to Bud's partial summary judgment motion, it suggested that the district court treat its motion to dismiss and opposition to partial summary judgment as a cross-motion for summary judgment.

On March 4, 1993, the district court granted the ALRB's motion to dismiss the complaint in its entirety for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Accordingly, the district court dismissed the cross-motions for summary judgment as moot. The court concluded that footnote 15 of the NLRB Regional Director's unit clarification decision "clearly indicated that the proper forum for determining the Bargaining Unit's status in this matter was the ALRB." The district court also concluded that abstention was warranted under the principles of *Younger v. Harris,* 401 U.S. 37 (1971). The court denied the ALRB's request for sanctions under Fed R. Civ. P. 11.

Bud appealed the district court's dismissal of its complaint, and the ALRB appealed the denial of Rule 11 sanctions. While this appeal was pending, the NLRB granted review of a unit clarification petition regarding another unit of Bud's employees. *Bud Antle, Inc.,* 311

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[9] The company also filed a motion for a preliminary injunction, which the district court denied because Bud had failed to demonstrate likely success on the merits.

NLRB No. 184 (Aug. 26, 1993). The Board stated that it granted review because the ALRB's decision that it had jurisdiction over the FFVW's case "create[d] a Federal-state jurisdictional conflict." *Id.* at 1. The Board specifically criticized the analysis employed by the ALRB and stated that it was inconsistent with well-established NLRB precedent. *See id.* at 2.

II.

A.

[1] Before considering the various procedural and substantive issues raised on this appeal, it is useful to review the basic outlines of NLRA preemption. The courts have developed two distinct doctrines for determining whether the Act preempts state law.[10] So-called "*Machinists* preemption," named for *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), "prohibits state and municipal regulation of areas that have been left ' "to be controlled by the free play of economic forces." ' " *Building & Construction Trades Council*, 113 S. Ct. at 1175 (quoting *Machinists*, 427 U.S. at 140). So-called "*Garmon* preemption," named for *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), preserves the primary jurisdiction of the NLRB by prohibiting the states from regulating activities that are at least arguably protected by § 7 of the NLRA or arguably prohibited by § 8 of that statute. *See id.* at 247; *accord*

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[10] The courts have also developed various principles for determining the preemptive effect of § 301 of the Labor-Management Relations Act. That provision is not at issue here, however.

Wisconsin Dep't. of Industry v. Gould, Inc., 475 U.S. 282, 286 (1986).

This case involves a question of *Garmon* preemption.[11] In a *Garmon* case, we must decide whether a state entity seeks to regulate conduct that is either arguably protected or arguably prohibited by the NLRA. If the conduct arguably falls within the scope of the Act, then the interest in a uniform federal labor policy identified in *Garmon* requires both the states and the federal courts to

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[11] Four of the company's six causes of action potentially involve theories other than *Garmon* preemption We conclude that the district court properly dismissed the company's third and sixth causes of action. However, the district court's dismissal order makes no mention of the fourth and fifth causes of action. Therefore, we remand these two claims to the district court for its consideration.

In its third cause of action, the company seeks a declaration that the ALRB's remedial authority is preempted by the NLRA, as well as an injunction prohibiting the ALRB from imposing any remedy against Bud. To the extent that this claim is based on *Garmon*, the analysis in the body of the opinion applies. However, Bud's brief suggests that the company partially basis its claim on *Machinists* as well. It suggests that *any* remedy imposed by the ALRB would intrude on the area Congress left to "the free play of economic forces." Although the district court did not explicitly address the issue, Bud's complaint fails to state a *Machinists* claim. Bud has not alleged that the ALRB has taken *any* remedial action, and it has not shown how any remedy the ALRB is likely to impose would impinge on its right to employ economic weapons.

Finally, the company's sixth cause of action seeks injunctive relief against the ALRB to require the state board to comply with the ALRA. In light of our decision that the ALRB's jurisdiction is preempted, we direct the district court to dismiss this claim as moot.

defer to the exclusive jurisdiction of the NLRB. *See Garmon*, 359 U.S. at 245.[12] However, the *Garmon* court noted two exceptions to its preemption principle. First the NLRA will not preempt state action which regulates activity of "a merely peripheral concern" to the Act. *Id.* at 243. Second, state action is not preempted "where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 244. With these basic principles established, we now turn to the issues presented by this case.

B.

[2] Initially, we must determine whether the lower federal courts are a proper forum to consider Bud's contention that *Garmon* ousts the state board of jurisdiction. This issue presents a complex question regarding the NLRA's enforcement scheme. Accordingly, we requested the view of the NLRB, the agency with primary responsibility for enforcing the Act. In its amicus submission, the Board expressed its opinion that a private party may bring an action in a federal district court for injunctive relief on the basis of *Garmon* preemption. We agree.

We would ordinarily have little difficulty deciding this issue, for it appears to be the general rule that a

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[12] If the Board explicitly decides that an activity is *neither* protected nor prohibited by the NLRA, then the activity can no longer be considered to be arguably protected or prohibited, and there is no *Garmon* preemption. *See id.*

private party may seek declaratory and injunctive relief against the enforcement of a state statutory scheme on the ground of federal preemption. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve."). Even in the absence of an explicit statutory provision establishing a cause of action, a private party may ordinarily seek declaratory and injunctive relief against state action on the basis of federal preemption. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting). Indeed, the Supreme Court has upheld a federal district court's grant of injunctive relief against a state on the basis of *Garmon* preemption. *See Wisconsin Dep't. of Industry v. Gould, Inc.*, 475 U.S. 282 (1986); *see also Building & Constr. Trades Council*, 113 S. Ct. at 1194-99 (considering *Garmon* action for injunctive relief against a state and rejecting it on the merits). In *Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993), we considered a complaint for injunctive relief brought by a private party alleging *Garmon* preemption.

These cases would seem to make it clear that a private party may bring an action in federal court seeking injunctive relief against state action on the basis of *Garmon*. However, language in one of our cases may appear to suggest the contrary. In *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir. 1988), we stated:

> It is also clear that the *Garmon* analysis is not one to be undertaken by the lower federal

> courts. "A claim of *Garmon* preemption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon*-preemption is raised, *it must be considered and resolved by the state court.*" If the state court errs in determining whether *Garmon* principles deprive it of jurisdiction over a dispute, review of that decision may be had in the Supreme Court.

Id. at 1399 (citations omitted) (quoting *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 393 (1986)) (emphasis in *Ethridge*). While it is possible to read this language as suggesting that parties are not free to invoke the power of the lower federal courts to vindicate a claim of *Garmon* preemption, such an interpretation is only partially correct. It is true that a party may not *remove* an action brought in state court simply because a *Garmon* defense is asserted. When such a defense is raised in state court, the state court must resolve it. However, we did not say, and would not have said, that no cases involving *Garmon* preemption may be filed or decided in federal court, or that federal courts were without power to enjoin *Garmon* violations.

Although *Ethridge's* language may appear at first glance to be all-encompassing, it must be read in context. So read, the *Ethridge* language is not applicable to, and does not control the present case. Our statements in *Ethridge* were addressed to an entirely different circumstance from the one presented here. *Ethridge* involved a case filed in state court in which *Garmon* preemption was raised as a defense. The defendant sought to remove to federal court what was otherwise a properly filed state-law claim. The holding in *Ethridge* was that the *Garmon*

doctrine does not afford such "complete preemption" as to transform a well-pleaded state-law claim into one arising under federal law simply because the defense of preemption is asserted. In *Ethridge*, we only held that district courts do not have original federal question jurisdiction over state-law claims which are subject to a defense of *Garmon* preemption, *see Ethridge*, 861 F.2d at 1396-1401, and that such claims may not be removed to federal court. For that reason, we said that the state court must decide the *Garmon* question. It was in that context – and that context only – that we stated that "the *Garmon* analysis is not one to be undertaken by the lower federal courts." *Id.* at 1399. In *Ethridge* we were not making any global statement, and we certainly did not intend to decide whether federal courts may enjoin state administrative proceedings that are preempted by *Garmon*.

Our holding in *Ethridge* constituted a simple application of the Supreme Court's decision in *Davis*. *See id.* *Davis* did not suggest, and *Ethridge* did not hold, that lower federal courts may *not* consider an action for injunctive relief on *Garmon* ground. It would be startling if the Court that decided *Davis* had made such a suggestion, for in the very same term it upheld precisely such a grant of relief. *See Gould*, 475 U.S. at 286-91 (upholding an injunction granted by a federal district court at the request of a private party). In short, all that the *Davis* language repeated in *Ethridge* holds is that if a state court action is brought and the defendant asserts *Garmon* preemption, the state court must decide that issue.

Moreover, despite the broad language in *Ethridge*, there are several circumstances in which this "lower federal court" has in fact "undertaken" the *Garmon* analysis.

Most obviously, we have done so when a party has raised *Garmon* as a defense to a state-law claim that is properly before the district court (through diversity or supplemental jurisdiction). *See, e.g., Milne Employees Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1413-18 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 2927 (1993). We have also done so on application of the NLRB, enjoining the enforcement of state regulations that are preempted by the Board's decision to exercise jurisdiction. *See N.L.R.B. v. California Horse Racing Bd.*, 940 F.2d 536, 539 (9th Cir. 1991). Finally, in *Babler Bros.*, a case identical to the present one for these purposes, we considered and decided a private party's action to enjoin enforcement of a state statute on the ground that the statute regulated activity which was arguably protected or prohibited by the NLRA. *See Babler Bros., Inc. v. Roberts*, 995 F.2d 911, 914-15 (9th Cir. 1993).

Our statements in *Ethridge* were correct in that case's context of removal. However, if they were read so broadly as to preclude a private party from seeking injunctive relief on *Garmon* ground, they would conflict with *Gould, Babler Bros.*, and the other cases discussed above. Moreover, such a reading would run directly contrary to the basic concern underlying the *Garmon* doctrine: the interest in preserving a uniform national labor policy and protecting employees and employers from local regulation which conflicts with the NLRA's centralized regulatory scheme. As the NLRB has explained in its amicus submission, private parties must be empowered affirmatively to invoke the *Garmon* doctrine on their own behalf. Although the Board has the authority to seek injunctions against state proceedings that conflict with its exercise of jurisdiction, *see e.g., N.L.R.B. v. Nash-Finch Co.*,

404 U.S. 138 (1971); *California Horse Racing Bd.*, 940 F.2d at 539, it lacks the resources to discover every preempted state proceeding and take action against it. We find the NLRA's assessment of its own limitations persuasive:

> In short, it is not practically possible for the Board to police all potential interference with federal labor law by the states. Allowing private parties, who have an interest in not being subject to conflicting rules, to assert that state laws or proceedings are preempted by federal law, would better serve the goal of uniform application of labor laws.

Because it is the only conclusion that is consistent with our case law and the principles underlying the *Garmon* doctrine, we hold that a private party may bring an action in a federal district court seeking injunctive relief on the basis of *Garmon* preemption.[13]

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[13] The ALRB argues that, to determine whether a private party has a right of action under the NLRA preemption doctrines, we must apply the four-factor test set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975). While we do not believe it necessary to do so in light of the Supreme Court's decision in *Gould*, we note that the *Cort* factors point in favor of recognizing a private party's right to seek injunctive relief against state action on the basis of *Garmon* preemption. First, parties who face regulation by preempted state tribunals are among those "for whose *especial* benefit" the *Garmon* doctrine was developed. *Id.* Second, there is no indication of legislative intent either to grant or to deny a private injunctive remedy for NLRA preemption. *See id.* Third, as the NLRB has made clear in its amicus submission, it is fully "consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff." *Id.* Finally, the cause of action – that a federal statute preempts some state action – is obviously not "traditionally relegated to state law." *Id.*

C.

Although we have concluded that a private party may bring a suit for injunctive relief to enforce the *Garmon* doctrine, we cannot turn to the merits of Bud's claim yet. Rather, we must decide whether the district court in this case had authority to enjoin the ALRB's ongoing administrative proceedings. In particular, we must determine whether the statutory limitations of the Anti-Injunction Act, 28 U.S.C. § 2283, or the equitable doctrine of *Younger*[14] abstention, bars injunctive relief in this case. We conclude that the Anti-Injunction Act does not prevent federal courts from enjoining state administrative proceedings. We also hold that *Younger* abstention does not apply.

1.

[3] The Anti-Injunction Act, 28 U.S.C. § 2283, provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This statute does not preclude us from granting the relief Bud seeks. By its plain and unambiguous language, the provision applies only to federal injunctions "to stay proceedings *in a State court.*" (emphasis added). The company is not seeking to enjoin proceedings in any "court."

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[14] Younger v. Harris, 401 U.S. 37 (1971).

Rather, it asks for an injunction against a pending adjudication in a state *administrative agency.* In a footnote in *Gibson v. Berryhill,* 411 U.S. 564 (1973), the Supreme Court stated that it "need not decide" whether the Anti-Injunction Act applies to state administrative proceedings. *Id.* at 573 n.12. However, both the text of the statute and its narrow purpose of preventing friction between the state and federal *judiciaries, see Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs.,* 398 U.S. 281, 287 (1970), lead to the conclusion that it does not prohibit a federal court from enjoining a state administrative proceeding.

Indeed, every circuit to decide the question has held that the Anti-Injunction Act means what it says: it limits a federal court's power to enjoin "proceedings in a State *court,*" but it does not affect the power to enjoin proceedings in any other entity of state government, such as a state administrative agency. *See Kerr-McGee Chemical Corp. v. City of West Chicago,* 914 F.2d 820, 824 (7th Cir. 1990); *American Motor Sales Corp. v. Runke,* 708 F.2d 202, 204-05 (6th Cir. 1983); *Engelman v. Cahn,* 425 F.2d 954, 958 (2d Cir. 1970) (Friendly, J.); *Taylor v. Kentucky State Bar Ass'n.,* 424 F.2d 478, 482 (6th Cir. 1970); *see also SMA Life Assurance Co. v. Sanchez-Pica,* 960 F.2d 274, 276 (1st Cir. 1992) ("While the Supreme Court has left the issue open, the appellate courts seem to agree that the Act applies only to state courts.") (citation omitted) (citing *Gibson,* 411 U.S. at 573 n.12); *Armstrong v. Maple Leaf Apartments, Ltd.,* 508 F.2d 518 (10th Cir. 1974) (holding the Anti-Injunction Act inapplicable unless tribunal is "performing a state judicial function"). We agree with these cases and hold that the Anti-Injunction Act does not bar an

injunction against an ongoing state *administrative* adjudication.

Thus, the Anti-Injunction Act is narrower in its application than is the *Younger* abstention doctrine. As discussed more fully in the next section, *Younger* applies even to state administrative proceedings, so long as they are "judicial in nature." *New Orleans Public Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 370 (1989). Yet the conclusion that a state administrative tribunal is "judicial in nature" for purposes of *Younger* abstention does not change the fact that it is still an administrative tribunal – not a "court." Thus, 28 U.S.C. § 2283 still does not apply. *See Erdmann v. Stevens*, 458 F.2d 1205, 1213 n.3 (2d Cir. 1972) (Lumbard, J., concurring) (stating that, while the Anti-Injunction act does not apply to state administrative proceedings, *Younger* abstention does); *Matson Navigation v. Hawaii Pub. Util. Comm'n*, 742 F. Supp. 1468, 1478 (D. Hawaii 1990).

Because Bud seeks to enjoin proceedings in a state administrative agency rather than a state court, we conclude that the Anti-Injunction Act does not provide a bar to relief.

2.

[4] In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that principles of comity, equity, and federalism ordinarily require federal courts to abstain from enjoining pending state criminal proceedings. Although *Younger* itself dealt only with criminal proceedings, the Court held in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), that the *Younger*

doctrine prohibits injunctions against certain state *administrative* proceedings as well, so long as those proceedings are "judicial in nature." *NOPSI*, 491 U.S. at 370. The Court in *Dayton* established a three-part test for determining whether a federal court should abstain. Under this test,

> [a]bstention is appropriate in favor of a state proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions.

Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1357-58 (9th Cir. 1986). In applying this test, we must adhere to the basic principle that "abstention from the exercise of federal jurisdiction is considered 'an extraordinary and narrow exception to the duty of a District Court to adjudicate the controversy properly before it.' " *American Int'l Underwriters v. Continental Ins.*, 843 F.2d 1253, 1256 (9th Cir. 1988) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)). Accordingly, "the balance must always tip heavily in favor of exercising jurisdiction." *Id.* at 1259-60.

We have previously held that ALRB adjudications are "judicial in nature." *Fresh*, 805 F.2d at 1357 n.3. Thus, the initial prerequisite for the application of the *Younger* doctrine is satisfied. Moreover, this case appears to satisfy the first and third requirements of the test applied in *Dayton Christian Schools* and *Fresh*. The ALRB instituted administrative proceedings in 1989, and these proceedings were ongoing when the company filed this action in federal court in 1992. Thus, "the state proceedings were underway before the federal proceeding was initiated

and had moved beyond the 'embryonic stage.' " *Id.* at 1358. In addition, the *Fresh* court held that the procedures for judicial review of ALRB orders in the California courts provide an adequate opportunity to raise claims of federal preemption. *See id.* at 1362. The record here indicates that the ALRB has fully (although erroneously) considered Bud's preemption claim as well.

[5] However, the ongoing state proceedings do not implicate any important state interest, because the NLRA clearly preempts the state board's jurisdiction. Although we held in *Fresh* that ALRB proceedings further an important state interest in protecting the collective bargaining rights of agricultural laborers, *see id.* at 1358-62, we also noted that when it is clear that "the state tribunal is acting beyond the lawful limits of its authority," there is "no principle of comity or of 'our federalism' " that abstention would serve. *Id.* at 1361 n. 11 (quoting *Baggett v. Department of Professional Registration*, 717 F.2d 521, 524 (11th Cir. 1983)). Because "[n]o significant state interest is served where the state law is preempted by federal law and that preemption is 'readily apparent,' " we will not apply *Younger* abstention in a case of clear preemption. *Gartrell Construction, Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991) (citing *Champion Int'l Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984)).

[6] As we explain in detail below, under the *Garmon* doctrine it is "readily apparent" that the ALRB is acting beyond its jurisdiction, for it is "readily apparent" that the employees in the bargaining unit at issue are at least "arguably" covered by the BLRA [sic]. In two separate unit clarification decisions, the NLRB has clearly expressed its view that the disputed operation falls under

the jurisdiction of the Board. One of these decisions involved a different bargaining unit from the one involved in the present case, but the same company and issue. The other involved the same bargaining unit as is involved here, but a different date.[15] The ALRB does not even allege that the NLRB would reach a different conclusion if it considered whether it had jurisdiction over the instant bargaining unit as of 1989. Rather, the state board merely argues that the two NLRB decisions incorrectly applied the law. As we explain below, this argument misconstrues *Garmon*. It does not detract from the clear conclusion that the ALRB's jurisdiction is preempted, for there is no doubt that the two unit clarification decisions make it at least "arguable" that the bargaining unit was covered by the NLRA.[16] Because it is "readily apparent"

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[15] The NLRB had decided only one of these two unit clarification petitions at the time the district court issued its disposition. However, we are required to apply the law as it exists at the time of our decision. *See The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

[16] In response to our inquiry, the NLRB replied that it believed that abstention would be appropriate regardless of the merits of Bud's preemption claim. (It expressed no view on the merits of the preemption issue.) The Board reasoned that the preemption issue in this case turns on whether the particular workers in the bargaining unit are "employees" under the Act, and that this determination is "at bottom a factual inquiry." Amicus Brief at 16. It relied on *NOPSI*, which stated that a preemption claim does not foreclose abstention if it "requires further factual inquiry." *NOPSI*, 491 U.S. at 367. However, the preemption issue in this case requires *no* further factual inquiry. The NLRB's decisions in cases involving the same company, issue, and unit make it clear by themselves that the ALRB's jurisdiction over the bargaining unit is preempted.

that the *Garmon* doctrine ousts the ALRB of jurisdiction, we conclude that *Younger* abstention is inappropriate.

D.

[7] Because we have concluded that Bud could properly maintain this action and that the district court erred in abstaining, we must now consider the merits of Bud's *Garmon* claim. We hold that the state board's proceeding seeks to regulate activity which is arguably protected or arguably prohibited by the NLRA. Accordingly, that proceeding is preempted.

1.

There is no doubt that, if the bargaining unit employees are covered by the NLRA, the conduct the state board seeks to regulate is at least arguably protected or prohibited under the Act. In the complaint filed on December 21, 1990, the ALRB's General Counsel alleged that Bud had failed to bargain in good faith, unlawfully subcontracted out work, unlawfully implemented its last offer, and refused to reinstate employees who abandoned the strike, among other violations. Neither party disputes that all of these actions are at least arguably unfair labor practices under §§ 8(a)(1), (3), and (5) of the NLRA. *See* 29 U.S.C. §§ 158(a)(1), (3), & (5). Indeed, the ALRB brought its complaint pursuant to the unfair labor practice provisions of the ALRA, which are almost identical to those in the NLRA. *See* Cal. Labor Code §§ 1153(a), (c), & (e).

[8] However, there is a question whether the NLRA applies to the relationship between Bud and the union –

or, to put it more concretely, to the particular employees at issue. The Act applies only to bargaining units composed of "employees" as defined in § 2(3). *See* 19 U.S.C. § 152(3). That section specifically provides that "[t]he term 'employee' . . . shall not include any individual employed as an agricultural laborer." *Id.* If Bud's employees are "agricultural laborers," then the NLRA does not apply, and the company's conduct is not arguably prohibited under the Act. However, if Bud's employees are *not* agricultural employees, then the company's conduct is at least arguably prohibited by the NLRA. Even if Bud's workers are only *arguably* not agricultural laborers, the company's conduct is at least arguably prohibited. As the Supreme Court held in a similar context (dealing with the supervisorial rather than the agricultural exemption), we must determine whether the workers in question are arguably "employees." If the workers are arguably "employees," then the state adjudication is preempted. *See International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 394 (1986) ("We should inquire, then, whether Davis was arguably an employee, rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts."). Thus, the question before us is whether Bud's workers are arguably "employees" rather than "agricultural laborers." We conclude that the workers were at least arguably "employees," and that the *Garmon* test is therefore satisfied.

The NLRA does not define the term "agricultural laborer." Every year since 1946, however, Congress has attached to the NLRB appropriations bill a rider which

requires the Board to follow the definition of "agriculture" set forth in § 3(f) of the Fair Labor Standards Act ("FLSA").[17] *See, e.g., Bayside Enterprises v. N.L.R.B.*, 429 U.S. 298, 300 n.6 (1977); *Camsco Produce Co.*, 1989-90 CCH NLRB ¶ 15,989 at 30,082 (1990). As the Supreme Court explained in *Bayside*, the definition in § 3(f) "includes farming in both a primary and a secondary sense." 429 U.S. at 300. In its primary sense, the term "refers to actual farming operations," including functions such as "cultivation, tilling, growing, and harvesting of agricultural commodities." *Camsco*, 1989-90 CCH NLRB at 30,082. In its secondary sense, the term "includes any practices which are performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." *Id.*

[9] Applying these definitions, it is at least arguable that Bud's cooling employees are not "agricultural laborers." The bargaining unit employees clearly do not

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[17] Section 3(f) provides

> "Argiculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

engage in agricultural activities in the primary sense – rather, they work at cooling facilities and perform tasks such as operating and maintaining cooling machines, storing produce, and loading and unloading trucks. Moreover, the workers arguably do not engage in secondary agricultural operations either. Because the workers do not work "on a farm," NLRB precedent requires them to satisfy two criteria in order to be categorized as agricultural laborers: Bud must be a "farmer," and the workers must perform tasks which are incidental to or in conjunction with *Bud's* farming operations. *See Camsco, supra; Employer Members of Grower-Shipper Vegetable Ass'n,* 1977-78 CCH NLRB ¶ 18,386 at 30,525-26 (1977). Bud fails both of these requirements; however, we need only discuss the first.

[10] It is at least arguable that Bud was not a "farmer" at the time of the events giving rise to the ALRB unfair labor practice charges. As of 1989, Bud grew very little of its own produce; indeed, it grew its last crop in that year. Rather than grow its own crops, Bud acquired crops primarily (and now exclusively) through a variety of contracting-out arrangements. Under these arrangements, growers raised the crops on their own land and were generally responsible for tending to them. Bud was responsible for harvesting the crops, and the company generally oversaw the growing process. The Board has held that a company which acquires its produce exclusively through similar contracting-out arrangements is not a "farmer." *See Employer Members,* 1977-78 CCH NLRB

at 30,526.[18] Indeed, in a decision subsequently affirmed by the full NLRB, the Regional Director concluded that, as of 1991, Bud was not a "farmer." The Regional Director relied on the fact that "the actual cultivation of the crops is performed by the growers, and that the growers retain the risk and the responsibility for the crops until they are harvested."

The Regional Director's decision, as well as the similarity of Bud's contracting-out arrangements to those the Board held insufficient to confer "farmer" status in *Employer Members,* requires us to conclude that Bud was at least arguably not a "farmer" as of 1989. Although the ALRB concluded that Bud was a "farmer" on that date, it did not present any reason to distinguish Bud's operations as of 1989 from its operations as of 1991. Instead, it took issue with the legal standard applied by the NLRB in the unit clarification proceedings. In reaching its conclusion, the ALRB employed a "single integrated enterprise" analysis – which has traditionally been applied *outside* of the agricultural context. Applying this analysis, the ALRB concluded that Bud did not act at arm's length from its contractor-growers, and therefore that Bud and its growers must be treated as a single enterprise. Yet, as the state board's ALJ acknowledged, "the NLRB has taken a different approach in dealing with agriculture." In a proceeding subsequent to the ALRB's decision on jurisdiction, the NLRB specifically criticized the state board for

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[18] Although *Camsco* overruled *Employer Members* in part, it left intact the portion of *Employer Members* which elaborated on the definition of "farmer."

failing to follow established NLRB precedents. *Bud Antle, Inc.*, 311 NLRB No. 184 (August 26, 1993).[19]

The Board's consistent interpretation of the statute, and its conclusion that Bud is not a farmer under this interpretation, make it at least arguable that the bargaining unit employees are not agricultural laborers. The Supreme Court in *Bayside* held that the courts must defer to the NLRB's interpretations of the "agricultural laborer" exemption "even if the issue might 'with nearly equal reason be resolved one way rather than another.' " 429 U.S. at 302 (citation omitted). The *Bayside* court rested this holding on the NLRB's "special duty [which] is to apply this broad statutory language to varying fact patterns." *Id.* at 304. The state board's ALJ distinguished *Bayside*, however, on the ground that:

> This is a situation where a State administrative agency – with its own statutory mandate, its own expertise, and its own "special duty to apply broad statutory language to varying fact patterns" – has entered into the picture and

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[19] The Board stated:

> As the state administrative law judge acknowledged in his decision, the Board has historically applied a different analysis in these types of cases, following FLSA regulations rather than applying the traditional single-employer analysis; has consistently found in prior cases that contract growers are in fact independent under that analysis; and the Supreme Court in [*Bayside*] appeared to uphold the Board's policy in this regard, citing with approval [*Norton & McElroy Produce*, 133 NLRB 104 (1961),] a case which is factually very close to the instant case.

Id. at 2 (citations and footnote omitted).

> asserted jurisdiction. In other words, the issue here is one of Federalism, and issues of federalism are to be resolved, not by simply deferring – as the Court did in *Bayside* – to the federal agency, but by careful, independent scrutiny of both the federal and the state statutory schemes to determine whether there is a necessary conflict.

We reject the ALRB's distinction. The ALJ's analysis is completely inconsistent with *Garmon*. *Garmon* preempts state jurisdiction over activity that is *arguably* protected or prohibited by the NLRA precisely in order to allow the *NLRB* to make the determination in the first instance and to ensure that "the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. As the *Garmon* Court explained, "It is essential that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board." *Id.* at 244-45. The Board's interpretations of the NLRA, and its decisions in the related unit clarification proceedings, make it at least arguable that the workers in the bargaining unit were *not* agricultural laborers.

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In light of the above, it seems clear that the ALRB is seeking to regulate activity which is at least arguably protected or prohibited by the NLRA. The state board does not assert that either of *Garmon's* two exceptions

apply in this case.[20] Rather, it argues only that the NLRB somehow vested the state board with jurisdiction to resolve the unfair labor practice charges that form the basis of this case. It presents two theories. First, the ALRB argues that the NLRB's Regional Director ceded jurisdiction to the state board when she made certain statements in refusing to apply her unit clarification decision retroactively. Second, the state board contends that the Board declined jurisdiction over the Bud dispute pursuant to NLRA § 14(c) and that this action vested the ALRB with jurisdiction under that provision. We reject both of these theories.

The ALRB argues that, in the course of her decision that the bargaining unit employees were covered by the NLRA, the Regional Director made an authoritative determination that the state board has jurisdiction over this dispute. It claims that Bud's action in the district court is merely an artfully-pleaded attempt to evade the general rule that there is no direct judicial review of unit clarification decisions. The ALRB's argument focuses on footnote 15 of the Regional Director's decision, which

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[20] In any event, we believe that the two exceptions would be inapplicable here. The types of unfair labor practices Bud is alleged to have committed are a central, rather than merely peripheral, concern of the NLRA. Moreover, even if there is a strong state interest in regulating agricultural labor relations in general, that interest is hardly so strong as to require us to conclude that it extends to the farthest conceivable limits – to off-the-farm work performed for non-farmers. To the contrary, in such cases, the strong policies of federal preemption are dominant.

stated that her role under the NLRA was merely to determine whether the unit sought was an appropriate unit under the Act and that the decision would therefore determine the facts and the law as of the hearing date. Thus, she said, her decision would have prospective effect only. The Regional Director went on to say that "[t]he effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts." It is this last remark the ALRB seizes upon.

[11] We conclude that the Regional Director's statement does not render *Garmon's* "arguably protected/arguably prohibited" analysis inapplicable in this case. Nothing in the Regional Director's decision indicates that she believed she had the authority to decide, or that she intended to decide, whether the ALRB or a federal court would be the appropriate forum in which to decide the question of the ALRB's jurisdiction in 1989, should that question be raised at some future date before a federal court. Nor did the Regional Director hold that the ALRB had exclusive, or any, jurisdiction to determine definitively whether *Garmon* preempted the earlier state proceedings against Bud. Rather, she merely stated that the issue of ALRB jurisdiction as of 1989 was not properly before her: "the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not appropriately addressed herein." She also observed that the 1989 problem remained where it was, before the ALRB, and that a hearing was there in progress. Therefore, she assumed, properly, that the ALRB would be required to decide the 1991 jurisdictional question first and that court review would follow. In any

event, even if the Regional Director had the authority to refer the *Garmon* issue to the ALRB, it is apparent that she did not do so here.

[12] Moreover, although *Garmon* preemption does not apply when the Board has determined " 'with unclouded legal significance' " that a particular activity is neither protected nor prohibited by the Act, *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n*, 382 U.S. 181, 190 (1965) (quoting *Garmon*, 359 U.S. at 246), the Regional Director's footnote did not constitute a determination of the merits of the preemption issue at all. It did not purport to state that Bud's alleged unfair labor practices were neither protected nor prohibited by the Act. As we have just explained, it merely stated that the issue of whether the bargaining unit was covered by the Act in 1989 was one that was not appropriately addressed in the particular unit clarification petition before it. The Regional Director averred that she could find no authority which allowed her to make any determination other than the one which is the primary object of a unit clarification proceeding: the determination of the legality or boundaries of a prospective bargaining unit. Thus, she found it "inappropriate" to consider any question regarding jurisdiction or coverage for periods prior to the hearing.

The Regional Director's statements in this case do not even come close to the NLRB actions the *Hanna Mining* Court found sufficient to have resolved the preemption question "with unclouded legal significance." In *Hanna Mining*, the Regional Director dismissed the employer's petition for a representation election on the stated ground that the unit employees were "supervisors" and thus not

"employees." The Board affirmed the Regional Director's decision and gave precisely the same reason he had given. In addition, on two subsequent occasions the company filed unfair labor practice charges which the Regional Director (again affirmed by the Board) dismissed on the ground that the employees in question were "supervisors" and thus outside the coverage of the Act. Here, by contrast, the Regional Director expressly refused to consider whether the employees were covered as of the date of the alleged unfair labor practices because this issue was not before her; nevertheless, she strongly suggested that the Act did reach the company's conduct. Moreover, the Board here has *expressly disapproved* the analysis employed by the ALRB in its interim decision on jurisdiction. If anything has been determined by the NLRB with "unclouded significance," it is that the ALRB does not have jurisdiction over the bargaining unit.[21]

[13] The ALRB also argues that footnote 15 of the Regional Director's decision constitutes a "declination of jurisdiction" under section 14(c) of the NLRA. Such a declination would allow the state board to assert

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[21] Although § 10(a) of the NLRA, 29 U.S.C. § 160(a), allows the Board "by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases," the record reflects no such agreement in this case, and the Regional Director's footnote cannot be taken as such an agreement. It was simply an explanation why the Regional Director did not address the pre-hearing status of the parties, as well as a prediction of which forum would decide that issue.

jurisdiction.[22] However, the footnote did not constitute a declination of NLRB jurisdiction. The Regional Director had no "jurisdiction" to resolve the earlier dispute in the clarification proceeding, so she had no "jurisdiction" to decline. The only matter properly before her in the unit clarification proceeding was the status of the bargaining unit as of the date of the hearing. Her decision did not in any way prevent, or purport to prevent, the NLRB from asserting jurisdiction over unfair labor practice charges based on the 1989 events. Indeed, when the union *did* bring NLRB charges based on these events, after the Board affirmed the Regional Director's decision, the General Counsel dismissed them on *statute of limitation* rather than on the jurisdictional ground. Because the Regional Director's footnote did not have any effect on the Board's

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[22] Section 14(c) states:

> (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
>
> (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State of Territory . . . from asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

29 U.S.C. § 164(c).

jurisdiction over the 1989 dispute, it was not a "declination of jurisdiction."

An ambiguous footnote in an individual unit clarification proceeding is not the type of action which § 14(c) contemplates as constituting a "declination of jurisdiction" which can override the NLRA's preemptive effect. That provision speaks of NLRB decisions to abstain from entire categories of cases, rather than individual cases. It allows the Board to "decline to assert jurisdiction over any labor dispute *involving any class or category of employers,* where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. § 164(c)(1) (emphasis added). Had Congress intended § 14(c) to apply to decisions not to exercise jurisdiction in *particular cases,* it could have ended the prepositional phrase with "labor dispute." The inclusion of the language referring to classes or categories of employers suggests that § 14(c) refers to a more categorical determination than the one the Regional Director assertedly made here. Our cases decided under that section make clear that the provision refers to categorical rather than individual decisions not to exercise jurisdiction. *See, e.g., N.L.R.B. v. Cofer,* 637 F.2d 1309, 1312 (9th Cir. 1981) ("Pursuant to this grant of discretion [§ 14(c)], the Board has established a jurisdictional yardstick for the hotel industry of $500,000 of annual gross income."); *N.L.R.B. v. Children's Baptist Home,* 576 F.2d 256, 258 n.1 (9th Cir. 1978) (stating that "the Board has adopted the policy of setting 'discretionary jurisdiction' standards which are expressed as a dollar amount of business volume" and that Congress had "expressly approved" this

policy in § 14(c)(1)). Because the Regional Director's footnote was an individual rather than a categorical decision, it was not a declination of jurisdiction under NLRA § 14(c).

III.

The ALRB's unfair labor practice proceedings against Bud clearly seek to regulate conduct which is arguably protected or prohibited under the NLRA. Because the state board is incorrect in its assertion that the NLRB ceded jurisdiction over Bud's dispute with the union, we conclude that the district court erred in denying the company's *Garmon* claim. Because preemption in this case is readily apparent, we also conclude that the district court erred in abstaining pursuant to the *Younger* doctrine. Accordingly, Bud is entitled to injunctive relief. Except as set forth in footnote 11, *supra*, we reverse the judgment of the district court.[23]

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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[23] In light of our resolution of the principal issues in this case, we also hold that the district court did not abuse its discretion in denying the ALRB's request for Rule 11 sanctions.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BUD ANTLE, INC. dba BUD OF CALIFORNIA, Plaintiff, vs. J. ANTONIO BARBOSA, et al., Defendants.	Case No. C 92-20666 JW ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING DEFENDANTS' MOTION FOR SANCTIONS (Filed Mar. 2, 1993)

Defendants J. Antonio Barbosa, Bruce J. Janigian, Ivonne Ramos Richardson and Linda A. Frick, officers of the California Agricultural Labor Relations Board ("ALRB"), move to dismiss Plaintiff Bud Antle, Inc.'s ("Plaintiff"), First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and for sanctions pursuant to Federal Rule of Civil Procedure 11.

For the reasons set forth below, Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6() is GRANTED. Defendants' Motion for Sanctions is DENIED.

BACKGROUND

In 1989, the ALRB began investigating and adjudicating unfair labor practice charges ("underlying charges") brought against Plaintiff by a Bargaining Unit representing some of Plaintiff's employees. Plaintiff subsequently filed a Complaint against Defendants in this Court for

Declaratory and Injunctive Relief and Damages. Plaintiff then filed a Motion for Preliminary Injunction, seeking to enjoin the ALRB from adjudicating these underlying charges until Plaintiff could file a Motion for Summary Judgment on two of its causes of action: (1) preemption of the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1991) ("NLRA") as to the unfair labor practice charges; and (2) Defendants' violation of the Agricultural Labor Relations Act, Cal. Labor Code section 1140-1166 (West 1989) ("ALRA").

The parties contend that the proper forum for adjudicating the underlying charges turns on the status of the Bargaining Unit employees as either agricultural laborers or non-agricultural laborers. Plaintiff argues that the Bargaining Unit employees are under the jurisdiction of the NLRB because they are not agricultural laborers.[1] In addition, Plaintiff argues that because these employees are not agricultural laborers, the NLRA precludes the ALRB from pursuing the underlying charges. Defendants contend that the Bargaining Unit employees are agricultural laborers, and thus fall under the jurisdiction of the ALRA.[2] In fact, the ALRB has concluded that the

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[1] Under the NLRA, "[t]he term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer. . . . " Title 29 U.S.C. § 152(3).

[2] The ALRA states in part:

> The term "agricultural employee" or "employee" shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended,

Bargaining Unit falls within its jurisdiction and has proceeded to adjudicate the underlying charges.

Because of this jurisdictional dispute, during the pendency of the ALRB proceedings on the underlying unfair labor practice charges, Plaintiff petitioned the NLRB for clarification of the Bargaining Unit's status. After a hearing on the matter, the Director for Region 21 of the National Labor Relations Board concluded that as of the date of the hearing, the Bargaining Unit employees were not agricultural laborers. However, even though the record before the Regional Director included the time period relevant to the underlying charges, the Director explicitly declined to determine the status of the Bargaining Unit employees with respect to that period.[3] In fact,

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as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(3)), Title 29, United States Code, and Section 3(f) of the Fair Labor Standards Act, (Section 203(f)), Title 29 United States Code.

Cal. Lab. Code § 1140.4(b); *see also* 29 U.S.C. § 152(3).

[3] The Regional Director stated in her order:

> The clarification made herein is only as of the date of the hearing herein. I specifically decline to make the declaration requested by Employer-Petitioner as to its status in 1989. The Employer-Petitioner cites case authority which mandates such a finding by me, and I conclude that it is inappropriate in the present proceeding.
>
> . . . .
>
> . . . The effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts.

Defs.' Ex. 21 at 20 n.15.

the Director held that the ALRB should evaluate the effect of the clarification hearing on the ALRB proceedings.

Plaintiff sought a preliminary injunction to enjoin the ALRB proceedings on grounds that the NLRA preempted the ALRB's jurisdiction over the Bargaining Unit. On November 18, 1992, this Court denied Plaintiff's motion. The Court did not find Plaintiff's preemption argument persuasive. Plaintiff had not demonstrated a likely success on the merits of its action. In addition, the Court concluded that to the extent that Plaintiff was seeking review by this Court of the NLRB's decision not to assert jurisdiction over the Bargaining Unit employees as well as the ALRB's decision to do so, Plaintiff was not entitled to relief.

Defendants now move to dismiss the action on the ground that it fails to state a claim upon which relief may be granted.

DISCUSSION

Pursuant to Federal Rule 12(b)(6), a complaint cannot be dismissed for failure to state a claim unless it appears certain that the "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957; *United Energy Owners v. United Energy Management*, 837 F.2d 356, 360 (9th Cir. 1988); *See also Rae v. Union Bank*, 725 F.2d 478, 479 (9th Cir. 1984); *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987). Moreover, the complaint must be construed in the light most favorable to plaintiff. *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980); *NK Indus.*,

Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986) (holding that the complaint's material allegations must be accepted as true). *See also United Energy Owners*, 837 F.2d at 360, *Sun Savings*, 825 F.2d at 191.

I: NLRA PREEMPTION

Plaintiff contends that the NLRA preempts the ALRA. Specifically, Plaintiff contends in its first claim that the preemptive effect of the NLRA precludes ALRB action on the underlying charges. Plaintiff's second claim contends that the NLRA preemption mandates that the ALRB must apply NLRB precedent in evaluating the status of the Bargaining unit as it relates to the underlying charges. Finally, in its third claim, Plaintiff contends that NLRA preemption prevents the ALRB from requiring that Plaintiff take remedial action related to the underlying charges against Plaintiff currently pending before the ALRB. Plaintiff seeks declaratory and injunctive relief as to these three claims.

As it did in its Motion for Preliminary Injunction, Plaintiff argues that if activity sought to be regulated by a state is even "arguably" subject to regulation under the NLRA, that this preempts the state's authority to act.[4]

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[4] Plaintiff quotes, inter alia, language from *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), which states: "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." *Id.* at 244.

Plaintiff relies on *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), to support this proposition. In *Garmon*, the Supreme Court stated:

> [T]he [National Labor Relations] Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. . . . [We have] held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the states free to regulate activities they would otherwise be precluded from regulating.

Garmon, 359 U.S. at 245-46 (footnote omitted).

Plaintiff argues that just because the NLRB declined to assert jurisdiction over the time period covering the underlying charges, this does not authorize the ALRB to assert jurisdiction over that time period. Plaintiff contends that since the Bargaining Unit employees are arguably non-agricultural employees and thus arguably subject to NLRA regulation, the state (ALRB) is not authorized to regulate activities relating to these employees.

This Court has already held, however, that the instant case is distinguishable from *Garmon*.[5] The Court

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[5] In *Garmon*, the NLRB simply declined to assert jurisdiction, thus failing to determine the status of certain disputed conduct. In other words, the NLRB was silent on the issue of jurisdiction. The Supreme Court in *Garmon* held that in such circumstances, the state may not jump in to assert jurisdiction where its jurisdiction would not otherwise exist.

did not find Plaintiff's *Garmon* preemption argument persuasive at the preliminary injunction stage of this matter and does not find it persuasive now. The ALRB has made its determination on the jurisdictional issue. This Court must defer to that determination.[6] "[S]tate administrative

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In this case, however, the NLRB was not silent on the issue of jurisdiction. With respect to the time period from the date of the NLRB hearing and beyond, the NLRB determined the status of the employees at issue. Moreover, with respect to the time period prior to the NLRB hearing (the period covering the underlying charges), the NLRB stated: "[t]he effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts." (Defs.' Ex. 21 at 20). In other words, the NLRB concluded that the status of the Bargaining Unit employees during the time period covering the underlying charges, and thus the question of the proper forum for adjudicating those charges, should be addressed by the ALRB. In addition, the NLRB concluded that the ALRB should determine the effect of the NLRB's order (regarding its determination of the status of the employees from the hearing date and beyond) on the time period prior to the hearing. Thus, rather than simply declining to assert jurisdiction, the NLRB explicitly stated that the proper forum for addressing the issue of jurisdiction for that period is in the ALRB proceedings. On this point, therefore, *Garmon* is inapplicable to the instant case.

[6] The ALRB bifurcated the hearing on the underlying charges, initially addressing only the jurisdictional questions, leaving the merits of the underlying charges for the second part of the hearing. The ALRB determined in this initial hearing that the underlying charges were subject to its jurisdiction. Although the ALRB's Administrative Law Judge noted that the NLRB Regional Director's Decision suggested "NLRB jurisdiction may have accrued earlier [than the time of the NLRB hearing]," he ultimately concluded that the ALRB had jurisdiction over that earlier period. (Pl.'s Ex. 9 at 62.) The ALRB affirmed the Administrative Law Judge's Decision in an interlocutory order.

proceedings, such as those of the ALRB, are entitled to the same deference from the federal courts as are state judicial proceedings, provided that the traditional prerequisites for application of the *Younger* doctrine have been met." *Fresh Int'l v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1357 (9th Cir. 1986); *see also Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619 (1986). *See generally Younger v. Harris*, 401 U.S. 37 (1971). This Court has finds [sic] that the *Younger* doctrine applies to this matter.[7] Accordingly, this Court will not interfere with the ALRB proceedings.[8]

In denying Plaintiff's Motion for Preliminary Injunction, this Court held that Plaintiff is not entitled to seek review of the NLRB's decision not to determine the status of the Bargaining Unit as of the time period at issue in this case. The NLRB clearly indicated that the proper forum for determining the Bargaining Unit's status in this matter was the ALRB. *See supra* note 3. "The extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion, and is not a question for the courts, in

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[7] See discussion *infra* Part II.

[8] The Court notes that the facts defining the Bargaining Unit's status during the time period evaluated by the NLRB and the immediately preceding time period (that period relevant to the underlying unfair labor practice charges) appear to be similar. Although the Administrative Law Judge for the ALRB concluded that the ALRB had jurisdiction over the Bargaining Unit, he noted that NLRB jurisdiction may have accrued during the time period relevant to the underlying charges. *See supra* note 6. However, this Court holds that it has no authority under federal or state law to review the ALRB jurisdictional decision, nor can it grant relief if such decision is in fact incorrect.

the absence of extraordinary circumstances, such as unjust discrimination." *Micronesian Telecommunications Corp. v. NLRB*, 820 F.2d 1097, 1101 (9th Cir. 1987).

As this Court has previously held, the discretion to exercise jurisdiction necessarily encompasses both the discretion to assume and to *not* assume jurisdiction. *See NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141, 144 (9th Cir. 1952) (holding that "[w]hether the Board should abstain, or assume jurisdiction in respect to a particular industry, or a particular labor dispute, [is a decision] exclusively for the Board"); *see also Garmon*, 359 U.S. at 246 (1959) (holding that "[i]n the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction"). Accordingly, it is not for this Court to question the NLRB's exercise of discretion in choosing not to determine the Bargaining Unit's status and thus not assert jurisdiction.

The ALRB has made a jurisdictional determination regarding the Bargaining Unit, as it was specifically directed to do by the NLRB Regional Director's Decision. *See supra* note 3. Plaintiff's preemption argument necessarily requires a review of the ALRB jurisdiction decision, something this Court has made clear that it cannot and will not do. This Court is not the proper forum for such relief. The ALRA sets forth the procedures for review of ALRB final orders. Plaintiff must seek relief from the California Court of Appeal. Cal. Lab. Code § 1160.8.

II. ABSTENTION DOCTRINE REQUIRES DISMISSAL OF THIS MATTER

Where important state interests are involved, federal courts should abstain in favor of ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* doctrine applies in the context of civil proceedings. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 619 U.S. 619, 627 (1986).

Moreover, the district court is *required* to dismiss a federal action, thus abstaining in favor of a state judicial proceeding, if "(1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The Court has determined that this matter satisfies each of the three prongs of the *Middlesex* test. Accordingly, for the reasons set forth below, the Court finds that abstention is appropriate in this matter.

A. State Proceedings are Ongoing

The state proceedings in this case began long before any federal court adjudication of the merits of this matter. However, the district court need only abstain when the "state proceedings have been initiated 'before any proceedings of substance on the merits have taken place in federal court' ". *Fresh Int'l*, 805 F.2d at 1358 (*citing Hicks v. Miranda*, 422 U.S. 332, 349 (1975)). Plaintiff filed a complaint as well as motions for a Preliminary Injunction and a Temporary Restraining Order in the Federal District

Court for the Southern District of California. Both motions were denied. Plaintiff appealed the Southern District's denial of the preliminary injunction, but subsequently voluntarily dismissed its appeal. Plaintiff also filed a similar complaint in the Northern District of California, and again filed a Motion for a Preliminary Injunction. This Court denied Plaintiff's Northern District Motion for Preliminary Injunction. This denial did no more than maintain the status quo. Neither party's position was changed as a result of the Court's ruling. Accordingly, the federal litigation has not moved beyond an "embryonic stage" *see Fresh Int'l*, 805 F.2d at 1358 n.5, and thus the second prong of the *Middlesex* test is met.

B. Proceedings Implicate Important State Interests

The ALRB has determined that the Bargaining Unit consists of agricultural employees and is thus subject to the ALRB's jurisdiction. It is well established that the State of California has a substantial interest in regulating the labor relations of agricultural workers. *See, e.g.*, Cal. Lab. Code § 1140.2 (1989); *Fresh Int'l*, 805 F.2d at 1358 n.5. This Court has established that it cannot review the ALRB's jurisdictional conclusion. *See* discussion *supra* Part I. Accordingly, the Court finds that the second prong of the *Middlesex* test is met.

C. State Proceedings Provide an Adequate Opportunity to Raise Federal Questions

The third prong of *Middlesex* is satisfied where a plaintiff may raise its federal claims in state court review

of administrative proceedings. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 619 U.S. 619, 629 (1986). The ALRA explicitly provides for such review. The ALRA authorizes the California Court of Appeal to "make or enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the [Agricultural Relations] board. Cal. Lab. Code § 1160.8. Accordingly, the Court finds that the third prong of the *Middlesex* test is met.

III. SANCTIONS

Defendant ALRB also requests this Court to impose sanctions pursuant to Federal Rule of Civil Procedure 11. The ALRB contends that Plaintiff's action is frivolous and wholly without merit. However, there is an apparent inconsistency between the NLRB and the ALRB determinations of the Bargaining Unit's status. Plaintiff, therefore, had a reasonable basis for seeking relief in federal court. Accordingly, Defendant ALRB's motion for sanctions is hereby denied.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is hereby GRANTED. Defendants' Motion for Sanctions is DENIED.

This Court has dismissed this action in its entirety. Accordingly, Plaintiff's Motion for Partial Summary Judgment and Defendants' Counter Motion for Summary Judgment are moot.

IT IS SO ORDERED.

DATE: March 1, 1993

/s/ James Ware
HONORABLE JAMES WARE
United States District Judge

The Anti-Injunction Act, 28 U.S.C. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The National Labor Relations Act, Title 29 U.S.C. § 151 et seq., provides in § 152(3):

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

The Fair Labor Standards Act, Title 29 U.S.C. § 201 et seq., provides in § 203(f):

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the

> production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The Agricultural Labor Relations Act, California Labor Code § 1140 et seq., provides in § 1140.4(b):

> The term "agricultural employee" or "employee" shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor Management Relations Act (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code).

(2)

SUPREME COURT, U.S.
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No. 94-1684

In The

Supreme Court of the United States

October Term, 1994

AGRICULTURAL LABOR RELATIONS BOARD, J. ANTONIO BARBOSA, IVONNE RAMOS RICHARDSON, and LINDA A. FRICK,

Petitioners,

v.

BUD ANTLE, INC. dba BUD OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF BY FRESH FRUIT & VEGETABLE WORKERS, LOCAL P-78B, AFL-CIO, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY AGRICULTURAL LABOR RELATIONS BOARD

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1. THE INTEREST OF AMICUS CURIAE FRESH FRUIT & VEGETABLE WORKERS LOCAL P-78B

Amicus curiae Fresh Fruit & Vegetable Workers, Local P-78B, CLC, AFL-CIO, is the Charging Party which brought unfair labor practice charges against BUD ANTLE, INC., before the AGRICULTURAL LABOR RELATIONS BOARD. The prosecution of those charges has been halted by the decision of the Ninth Circuit Court of Appeals in *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994).

The interest of the Union goes far beyond the protection of its members in this particular dispute with BUD ANTLE, INC. Hundreds of thousands of workers in the United States work in and about the agricultural industry, which is one of the largest industries in the nation. Numerous labor unions, including the Fresh Fruit & Vegetable Workers, represent or seek to represent these workers. Some states, including California, Idaho and Arizona, have enacted statutes regulating the labor relations between employers and workers working in agriculture who have been excluded by Congress from the protections of the Labor-Management Relations Act (LMRA), 29 U.S.C. Section 152(3). Many states have enacted labor relations statutes governing the labor relations of other types of workers, such as public employees, excluded from the protections of the LMRA.

The decision of the Ninth Circuit Court of Appeals in *Bud Antle, Inc., v. Barbosa, supra,* constructs a barrier against obtaining legal redress under these state statutory schemes by permitting an employer, after the passage of the brief six month LMRA statute of limitations, to defeat

state labor relations jurisdiction by showing that the workers in the dispute are "arguably" rather than "actually" employees under the LMRA. The concrete result of the Ninth Circuit's decision will be that workers falling in this category will be deprived of all remedy for employer unfair labor practices.

2. THIS BRIEF BRINGS TO THE COURT'S ATTENTION THE NEED TO CLARIFY THE COURT'S DECISION IN *INTERNATIONAL LONGSHOREMEN'S ASSOCIATION V. DAVIS* WHICH IS NECESSARY TO BRING CERTAINTY AND FAIRNESS TO QUESTIONS OF FEDERAL/STATE LABOR RELATIONS ACT JURISDICTION

In consideration of the petition for writ of certiorari filed by the California AGRICULTURAL LABOR RELATIONS BOARD (ALRB), the Court must examine an important question of federal law not presented in the petition, which impacts squarely upon the proper accommodation of federal power and state rights. In *International Longshoreman's Association, AFL-CIO v. Davis,* 476 U.S. 380, 394 (1985), the Court held that the standard of "arguable" be applied to determine whether a person was a statutory employee for purposes of *Garmon* preemption. The important question of law presented is whether *International Longshoreman's Association, AFL-CIO v. Davis, supra,* should be clarified with regard to cases in which jurisdiction over the person(s) has been asserted by a state agency which is parallel or similar in form and content to the National Labor Relations Board (NLRB) and has been established to regulate labor relations of workers specifically excluded by the LMRA.

3. SUMMARY OF ARGUMENT

In the promulgation of the LMRA, Congress specifically excluded certain categories of workers from the protection of that statute. Since then, many states have acted to fill those voids by enacting statutory schemes similar in substance to the LMRA to cover workers left unprotected by that statute.

The determination of whether a particular worker is excluded from the protections of the LMRA can be particularly fact intensive. For example, whether a worker is an "agricultural laborer" and therefor excluded from the protections of the LMRA depends upon a factual inquiry into the exact type of work the worker performs, whether the work is performed upon the product of an independent grower, and, if so, with what regularity work is performed on the product of an independent grower.

In the context of state regulatory labor relations schemes, like the California Agricultural Labor Relations Act (ALRA), which closely parallels the LMRA, application of a standard of "arguable" to the status of workers does not serve the purposes of *Garmon* preemption because the prospect of conflict with federal labor policy is very remote or nonexistent.

Moreover, an employer can assert *Garmon* preemption in a state labor relations proceeding well after the expiration of the six month LMRA statute of limitations. Application of an "arguable" standard as to status, without a factual determination that the worker was actually subject to NLRB jurisdiction at the time of the alleged wrongs, creates a jurisdictional "no-man's land" in which a wronged worker can not obtain relief either through the

state labor relations agency or the NLRB. The purposes of both the state and federal statutory schemes are frustrated, and serious injustice results.

4. *INTERNATIONAL LONGSHOREMAN'S ASSOCIATION V. DAVIS* MUST BE CLARIFIED SO THAT THE "ARGUABLE EMPLOYEE" STANDARD NOT APPLY IN SITUATIONS WHERE PARALLEL STATE LABOR RELATIONS AGENCIES VESTED WITH REGULATING WORKERS EXCLUDED FROM THE LMRA HAVE ASSERTED JURISDICTION

The LMRA excludes by its terms a variety of workers, including "agricultural laborer(s)", domestic workers, public employees and employees of employers covered by the Railway Labor Act. 29 U.S.C. Sections 152(2),(3). Like California, many states have enacted labor relations statutes that are similar in substance and procedure to the LMRA to regulate the labor relations of those workers specifically excluded by Congress from the ambit of the LMRA. *See, e.g.*, 23 Az. Revised Statutes Annotated, Sections 23-1381 et seq. (agricultural employees); 22 Idaho Code Sections 22-4101 et seq. (agricultural employees). The California ALRA is one such statutory scheme, the provisions of which closely parallel the form and substance of the LMRA and its enforcement agency, the NLRB. Cal. Labor Code Section 1140 et seq. By its express terms, the ALRA governs only " . . . those employees excluded from coverage of the National Labor Relations Act, as amended, as agricultural employees . . . " Cal. Labor Code Section 1140.4 (b) (App. 55).

Following an evidentiary hearing that lasted numerous days, the ALRB held that it had jurisdiction over the vacuum cooler workers involved in the dispute with Bud Antle, Inc. *Bud Antle, Inc.*, 18 ALRB No. 6 (1992). Nonetheless, the Ninth Circuit Court of Appeals in *Bud Antle, Inc. v. Barbosa, supra*, applied the "arguable" employee standard set forth in *International Longshoreman's Association, AFL-CIO v. Davis, supra* at 394, to find *Garmon* preemption without engaging in an analysis of the facts pertaining to the status of the Bud Antle workers involved. (App. 4, 14-15, 27). In resolving the question whether ship superintendents were statutory employees or "supervisors", for whom parallel state labor relations acts do not exist, the Court in *Davis* took the "arguable" standard, which it had applied to activity in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959), and applied it to status.

> We should inquire, then, whether Davis was arguably an employee, rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts.
>
> *International Longshoreman's Association, AFL-CIO v. Davis, supra* at 394.

Since the Court's 1959 decision in *Garmon*, numerous states have passed legislation governing the labor relations of workers specifically excluded by the LMRA. In the context of state assertion of jurisdiction over persons and disputes under these statutes, the "arguable employee" standard of *International Longshoreman's Association, AFL-CIO v. Davis, supra*, must be held not to apply. In this context, the "arguable employee" standard

does not serve the purpose of *Garmon* preemption. Moreover, the application of this standard in this context creates uncertainty for those workers seeking relief from unfair labor practices and can lead to lawlessness, as has happened in this case.

A. IN THE CONTEXT OF PARALLEL STATE LABOR RELATIONS SCHEMES, THE "ARGUABLE EMPLOYEE" STANDARD DOES NOT SERVE THE PURPOSES OF GARMON

In the absence of an express Congressional declaration of preemption, *Garmon* preemption has rested upon the inference that Congress intended to deprive the states of the power to act in ways that threatened interference with the policy of industrial relations set forth in the LMRA. *San Diego Building Trades Council v. Garmon, supra* at 243-244.

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law.
>
> *San Diego Building Trades Council v. Garmon, supra* at 244.

If certain activity is merely a peripheral concern of the LMRA or touches interests deeply rooted in local feeling and responsibilities, this Court has held that *Garmon* preemption does not apply because the danger of interference "with the central aim of federal regulation" is remote. *San Diego Building Trades Council v. Garmon, supra; Farmer v. United Brotherhood of Carpenters & Joiners*

of America, Local 25, 430 U.S. 290, 296-297 (1977). For the same reason, this Court has held *Garmon* preemption not to apply where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes. *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, supra* at 296-297, 305. This Court has affirmed that these areas of nonapplication of *Garmon* preemption " . . . highlight our responsibility in a case of this kind to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, supra* at 297.

In the context of an assertion of jurisdiction over persons by a state agency similar to the NLRB which is vested with jurisdiction over employees excluded by the LMRA, the "arguable" standard does not serve the purpose of *Garmon* preemption. In this situation, there is no danger of interference with the central aim of the federal regulatory scheme because the state rules and processes of decision are either consistent with or substantially similar to those of the NLRB. For example, the ALRA mandates that the ALRB follow the " . . . applicable precedents of the National Labor Relations Act". Cal. Labor Code Section 1148.

Moreover, the question of status, and hence jurisdiction, is necessarily intensely factual. The state agency either does or does not have jurisdiction over the person, which can be resolved in the appellate process from the

state proceedings. If jurisdiction over the person is properly asserted by the state agency, there can be no interference with the federal regulatory scheme because the involved workers have been excluded from that scheme by Congress. If the state agency does not have jurisdiction as determined by the agency or appellate courts, it has no power to act. This point seems to be precisely the one made by the Regional Director of the NLRB when, in unit clarification proceedings in 1991, she refused to retroactively assert jurisdiction over the Bud Antle workers, stating:

> The clarification made herein is only as of the date of the hearing herein. I specifically decline to make the declaration requested by the Employer-Petitioner as to its status in 1989. . . . The effect of the clarification herein on the proceedings before the ALRB should be determined by the ALRB and the reviewing courts. Thus, the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not appropriately addressed herein.
>
> (App. 9-10).

One aim of the LMRA was to protect only certain types of workers, to the exclusion of others. Application of the "arguable" standard as to status of workers in the context presented here does nothing to serve the purpose of *Garmon* and only serves to strip state rights from employees who Congress has excluded from the protection of the LMRA.

In *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___ 114 S.Ct. 2239, 2251 (1994) the Court in a Railway Labor Act

case rejected the argument that action "arguably justified" by the collective bargaining agreement resulted in 29 U.S.C. Section 301 preemption. In so holding, the Court stated:

> Obviously, this test said nothing about the threshold question whether the dispute was subject to the RLA in the first place.
>
> *Hawaiian Airlines, Inc. v. Norris, supra.*

In like vein, the "arguable" standard inadequately addresses the question of whether a worker is subject to the LMRA as opposed to a state labor relations act.

B. THE DECISION OF THE NINTH CIRCUIT CREATES A JURISDICTIONAL "NO-MAN'S" LAND WHICH CAN DEPRIVE TENS OF THOUSANDS OF WORKERS OF THE PROTECTION OF LABOR RELATIONS LAWS

Over the last two decades, the NLRB has applied shifting and inconsistent standards to determine whether a worker engaged in "secondary" type activities in an agricultural concern was a statutory "employee". All of its jurisdictional standards, including the present one, depend upon facts best known to the employer. In 1976, the NLRB held in *DeCoster Egg Farms*, 223 NLRB 884 (1976), that the handling by an employee of any farm product not grown by the employer or on the employer's farm would result in a finding of employee status. Without resolving the apparent conflict created with *DeCoster*, the NLRB in 1977 decided in *Employer Members of Grower-Shipper Vegetable Association*, 230 NLRB 1011 (1977), that

workers would be considered statutory employees only if a regular and substantial portion (judged in excess of 10-15%) of their work was performed hauling or processing the crops of a grower other than their employer. In 1990, in the midst of the labor dispute in this case, the NLRB changed that standard in *Camsco Produce Company, Inc.*, 297 NLRB 905 (1990), to include as statutory employees those workers who "regularly" handle more than a de minimis amount of produce of a farmer other than the employer. The *Camsco* standard, which prevails at present, is one that is peculiarly susceptible to manipulation by employers in agriculture, who are able to rapidly manipulate contracting arrangements with other growers because of the seasonal nature of the industry. In recent years, labor unions in the agricultural sphere have seen employers make rapid, alternating claims of NLRB and ALRB jurisdiction as suits their needs.

The NLRB, ALRB and similar parallel state labor relations agencies are structured to be accessible to workers and union and employer non-lawyer representatives. Each may file unfair labor practice charges in order to invoke the legal protection of a labor relations agency. The statute of limitations is typically short; the LMRA permits the filing of an unfair labor practice charge only for a period of six (6) months after the alleged unfair labor practice. 29 U.S.C. Section 160(b).

Because of the factual nature of the NLRB'S jurisdictional standard and the brief statute of limitations, the application of the "arguable" standard to the status of a worker under *Garmon* presents the tens of thousands of persons working in the agricultural realm in California

alone with great uncertainty regarding from which agency to seek relief and for what period of time.

Moreover, the "arguable" standard when applied to employee status can and will create a jurisdictional "no-man's" land which effectively deprives workers of the protection of labor relations statutes. The Court in *International Longshoreman's Association, AFL-CIO v. Davis, supra,* held that *Garmon* preemption was jurisdictional, which could be raised by a party at any time. While "arguable" necessitates some type of showing, that showing need not be that the NLRB in fact had jurisdiction over the person. See *International Association of Longshoremen, AFL-CIO v. Davis, supra* at 395. Without examination of the jurisdictional facts and a determination that the NLRB in fact has jurisdiction over the person, a post-statute of limitations application of the "arguable" standard to status will deprive workers of the protection of both the LMRA and state labor relations statutes, when it is not even known whether the NLRB in fact had jurisdiction in the first place. Here, the Ninth Circuit neither examined the jurisdictional facts extant at the time of the alleged wrongs nor made a factual determination sufficient to premise a finding of federal jurisdiction. This result frustrates the purposes of the LMRA and the state labor relations statute and is grossly unfair.

This case is an example in point. During the thirteen years of a collective bargaining relationship preceding the 1989 labor dispute, Bud Antle and the Union stated explicitly in their collective bargaining agreements that recognition of the Union was based upon a certification by the ALRB. (App. 5). Following a break-down in collective bargaining, approximately 150 Bud Antle employees

struck and were subsequently locked out by the employer. (App. 6). In the late summer and fall of 1989, the Union and Bud Antle both filed charges with the ALRB. It was not until April, 1990, long after the expiration of the six month NLRB statute of limitations concerning Bud Antle's conduct in August and September, 1989, that Bud Antle formally challenged the ALRB'S jurisdiction in a letter to the ALRB Regional Director. (App. 7). When the Union attempted to file charges with the NLRB within six months after the unit clarification by the NLRB Regional Director, the NLRB dismissed the charges as untimely filed. (App. 9-10). The ALRB continued prosecution of the unfair labor practice charges against Bud Antle, conducting an adversarial hearing after which the ALRB Administrative Law Judge recommended a decision finding Bud Antle had committed serious and extensive unfair labor practices. Five (5) years after the eruption of the dispute, the Ninth Circuit decision brought those proceedings to a halt upon that Court's conclusion that the Bud Antle workers aggrieved by the unfair labor practices of Bud Antle, Inc., were "arguably" statutory employees. Despite the legislative efforts of Congress and the State of California, these Bud Antle workers are left without a forum for redress in a jurisdictional "no-man's" land. Without proper accommodation between federal and state labor relations jurisdictions, many more workers like them face the same fate. Surely, as the Court observed in another preemption case, Congress did not intend the primacy of NLRB jurisdiction to create "such a lawless regime." *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983).

5. CONCLUSION

When a state labor relations agency similar to the NLRB has asserted jurisdiction over a person who the agency adjudicates as excluded by the LMRA, there is little risk of conflict with the central aims of the LMRA. Moreover, the ability of an employer or union to assert *Garmon* preemption and prevail on an "arguable" standard well after the expiration of the six (6) month LMRA statute of limitations creates uncertainty and deprives wronged employees of remedy. For these reasons, the petition of the ALRB for a writ of certiorari must be granted.

DATED: June 2, 1995

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In The

Supreme Court of the United States

October Term, 1994

AGRICULTURAL LABOR RELATIONS BOARD, J. ANTONIO BARBOSA, IVONNE RAMOS RICHARDSON, and LINDA A. FRICK,

Petitioners,

v.

BUD ANTLE, INC., d/b/a BUD OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
To The Ninth Circuit Court of Appeals

BRIEF OF AMICI CURIAE STATES OF MONTANA, HAWAII, IDAHO, KANSAS, MARYLAND, NEBRASKA, NEVADA, NEW MEXICO, PENNSYLVANIA, SOUTH DAKOTA, VIRGINIA, AND UTAH IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION

The amici curiae States of Montana, Hawaii, Idaho, Kansas, Maryland, Nebraska, Nevada, New Mexico, Pennsylvania, South Dakota, Utah and Virginia, through their respective Attorneys General, respectfully submit a brief pursuant to S. Ct. R. 37.2 in support of the petition for a writ of certiorari.

INTEREST OF AMICI

This Court has long been concerned with the proper allocation of judicial power between state and federal courts. A cornerstone of the modern conception of judicial federalism is the rule established in *Younger v. Harris*, 401 U.S. 37 (1971), where the Court explained that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45. This principle is based in concepts of equity and is

> reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 44. In *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 627-28 (1986), this Court affirmed that these same principles apply to state administrative proceedings that are "judicial in nature."

Each amici state is a partner in the federal union and a sovereign in its own right. Each has a variety of administrative agencies which make adjudicatory decisions subject to review in state court and, where federal questions are involved, in this Court. These adjudicatory processes exist to vindicate both state and federal interests and are as capable of protecting the latter as they are the former. The amici are interested in maintaining the integrity of their adjudicatory processes for two main reasons: The first is assuring an environment conducive to the responsible and informed evolution of state laws and policies, and the second is assuring that those processes remain adequate to the task of protecting their citizens' federal, as well as state, rights and interests. Routine federal interference in state adjudicatory proceedings undermines these interests.

The decision below represents an unprincipled intrusion by the federal judiciary into an ongoing state adjudicatory proceeding. If left to stand, the rationale employed by the Court of Appeals to justify that intrusion threatens to undermine the delicate balance of state-federal judicial relations and frustrate this Court's efforts to maintain the integrity of our federal judicial structure.

SUMMARY OF ARGUMENT

The Court of Appeals committed two errors in considering the propriety of abstaining under *Younger v. Harris*, 401 U.S. 39 (1971). The first was considering the federal plaintiff's claim of a competing federal interest in conjunction with the "state interest" prong of the three-part *Younger* test. In *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989), this Court held that the important state interest inquiry focused on the importance of the generic proceeding to the state and did not

consider possibly countervailing federal interests in the outcome of the particular proceeding.

The Court of Appeals' second error was concluding that a "readily apparent" claim of federal preemption sufficed to except the case from *Younger* without a showing that the federal plaintiff lacked adequate remedies under state law. The Court has repeatedly held that the simple fact a state statute or proceeding may be unconstitutional does not except a case from *Younger* unless an additional showing of irreparable injury is made, which usually involves a showing that the state courts are not adequate to remedy the constitutional defect. This same principle should apply when it is argued that the subject state statute or proceeding is preempted by federal law.

If the Court of Appeals' approach is accepted, essentially every preemption claim will be captured by this exception. In that event, federal courts will be obligated to engage in highly speculative, essentially standardless inquiries as to whether any given preemption argument is sufficiently strong to warrant the exception's application. The exception identified by the Court of Appeals thus promises to swallow the rule.

ARGUMENT

THE COURT OF APPEALS' DECISION PRESENTS THIS COURT WITH AN OPPORTUNITY TO CLARIFY THE APPLICATION OF THE *YOUNGER V. HARRIS* ABSTENTION DOCTRINE IN CASES INVOLVING CLAIMS OF FEDERAL PREEMPTION AND TO REAFFIRM THE IMPORTANT PRINCIPLES OF FEDERALISM UPON WHICH IT RESTS.

It is by now well established that a federal court should decline jurisdiction when it has been asked to take action that

threatens to interfere with (1) an ongoing state proceeding, (2) involving an important state interest, and (3) in which there is an adequate opportunity to raise the involved federal question. *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619, 627 (1986); *Middlesex Co. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). If these elements are present, the federal court may still exercise jurisdiction if there are "extraordinary circumstances," such as a state law that "is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort may be made to apply it." *Younger*, 401 U.S. at 54-55, *quoting Watson v. Buck*, 313 U.S. 387 (1941). As the decision below suggests, the application of these seemingly clear principles remains unpredictable and inconsistent.

While having its own procedural complexities, the case below arose like many others under *Younger*. Respondent Bud Antle, Inc. ["Bud"] found itself defending against charges of unfair labor practices filed by a number of its employees before a state administrative agency--Petitioner California Agricultural Labor Relations Board ["ALRB"]. In those proceedings Bud contended that the ALRB's jurisdiction to adjudicate the involved charges was preempted by the National Labor Relations Act. *See* 29 U.S.C. § 152(3). Bud asked for and received an interlocutory ruling from the ALRB on that issue.[1] Unhappy with that ruling, and before exhausting all of the remedies available to it before the ALRB and in the California state courts, Bud filed an action in federal district court. This factual scenario is not unique and, as the district court recognized, fits foursquare into the *Younger* model. App. at 50; *see, e.g.*, *Dayton Christian Sch.*, 477 U.S. at 627; *Fresh*

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[1]Bud also asked the National Labor Relations board ["NLRB"] to address this issue. The NLRB's ruling, however, did not address the specific question at issue in the ALRB proceedings: the status of Bud's cooler employees in 1989. (App. at 9.)

Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986).

The Court of Appeals conceded the applicability of the first and third *Younger* prongs and, as to the second, concluded that a "readily apparent" claim of preemption was sufficient to defeat a finding of an "important state interest." (App. at 25.) After framing the issue in that manner, the Court of Appeals found that preemption of the ALRB's decision under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), was "readily apparent," and reversed the district court's *Younger* dismissal, holding that "the ongoing state proceedings do not implicate any important state interest because the NLRA clearly preempts the state board's jurisdiction. (App. at 25.) The Court of Appeals, in sum, collapsed its decision as to whether *Younger* abstention was proper into its determination of the preemption claim's merits.

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) ["NOPSI"] makes clear that the Court of Appeals abstention analysis was wrong in two respects. The first was in considering the claim of federal preemption in conjunction with the "state interest" prong, and the second was creating out of whole cloth a new "readily apparent" preemption exception to *Younger* abstention.

In *NOPSI* the Court addressed whether *Younger* abstention was warranted in deference to an ongoing state ratemaking proceeding. While ultimately holding it was not,[2] the Court first analyzed whether the proceedings at issue involved an "important state interest." As in the instant case, the underlying dispute in *NOPSI* involved the question of

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[2]The *NOPSI* Court held that abstention under *Younger* was inappropriate because the underlying administrative rulemaking proceeding was not "judicial in nature" (491 U.S. at 370)--a question not at issue here.

whether the involved state regulatory scheme was preempted by federal law. In seeking to avoid abstention, the *NOPSI* petitioner argued that:

> *Younger* cannot bar a federal court adjudication when, as here, the federal claim is that the state's jurisdiction to conduct the proceeding is ousted by federal law and that the state, therefore, may have no "legitimate" or "important" substantive interest.

Pet'r Br. at 32, *NOPSI* (No. 88-348); *see also* United States Br. at 22, *supra*. The Court's response was unequivocal:

> We disagree. There is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees, and constitutional challenges to state action, no less than preemption-based challenges, call into question the legitimacy of the State's interest in its proceedings reviewing or enforcing that action.

NOPSI, 491 U.S. at 365. The Court went on to explain:

> [W]hen we inquire into the substantiality of the State's interests in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case--which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

Id. The same error occurred below. Bud's argument in this case is not that the California Agricultural Labor Relations Act (Cal. Labor Code §§ 1140 to 1166) is unimportant or entirely

preempted by federal law, but rather that a specific decision of the ALRB interpreting that law is erroneous and encroaches on a matter governed exclusively by the NLRA. The Court of Appeals likewise employed "too narrow an analytical focus" (*NOPSI*, 491 U.S. at 366) when it measured the substantiality of California's interest by focusing on the outcome of this specific case rather than its admitted "important state interest in protecting the collective bargaining right of agricultural laborers." (App. at 25.)[3]

Nor did the Court of Appeals consider the other "important state interest" affected by its ruling: California's interest in preserving the integrity of its administrative judicial review process. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), the Court emphasized that it has "repeatedly . . . recognized that the States have important interests in administering certain aspects of their judicial systems." 481 U.S. at 12-13. The logical implication of this Court's decisions extending *Younger* to state administrative proceedings and requiring federal plaintiffs to exhaust available state appellate remedies is that a state's administrative judicial review process is one of those aspects. *See Dayton Christian Sch.*, 477 U.S. at 627; *Middlesex*, 457 U.S. at 434-35; *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609-10 (1975). Allowing state agency litigants to "jump ship" prior to exhausting their state

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[3]The error rested in the Court of Appeals' reliance on several pre-*NOPSI* decisions that did not recognize the analytical distinction drawn in that case and which treated the preemption claim as simply part of the "important state interest" inquiry: *Fresh Int'l Corp.*, 805 F.2d at 1361, n.11; *Champion Int'l Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984); and *Baggett v. Department of Professional Reg. Bd. of Pilot Comm'rs*, 717 F.2d 521 (11th Cir. 1983). The only post-*NOPSI* decision cited by the Court of Appeals, *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991), likewise did not discuss *NOPSI* in relation to this question.

appellate remedies will eviscerate state judicial review processes and affect the functioning of state administrative law.

Even though the Court of Appeals did not address Bud's preemption claim in the context of *Younger*'s "exceptional circumstances" or "flagrantly and patently violative" exceptions, the question remains whether the decision below can be squared with them. It cannot. First of all, the Court of Appeals' "readily apparent" standard lacks any textual support in this Court's decisions and falls short of the high threshold this Court has set for the *Younger* exceptions. More importantly, however, and irrespective of the correctness of its preemption determination, the Court of Appeals did not take the next logical--and required--step of explaining why the California state courts are not up to the task of rectifying this problem. *Younger*'s exceptions are simply an aspect of its equitable roots, and equitable relief will not be accorded unless a plaintiff can show the likelihood of irreparable injury in its absence. *NOPSI*, 491 U.S. at 366; *Huffman*, 420 U.S. at 602; *Younger*, 401 U.S. at 54-55. This Court has on many occasions been invited to except cases from *Younger* on the grounds of constitutional invalidity, and has declined because of the presence of adequate state remedies. *See NOPSI*, 491 U.S. at 367; *Moore v. Sims*, 442 U.S. 415, 433 (1979); *Trainor v. Hernandez*, 431 U.S. 439, 447-48 (1977); *Juidice v. Vail*, 430 U.S. 327, 338 (1977); *Kugler v. Helfant*, 421 U.S. 117, 125-27 (1975). In this case Bud has adequate remedies before the ALRB and in the California state courts to litigate its preemption claim, and requiring it to do so hardly constitutes the type of harm that equity will intervene to protect. *E.g.*, *Trainor*, 431 U.S. at 443; *Huffman*, 420 U.S. at 602-03; *Younger*, 401 U.S. at 47.

Aside from the analytical flaws in the Court of Appeals' approach, there are important practical--and untoward--consequences from the decision below. *Younger* abstention flows from this Court's efforts to maintain the

integrity of our federal judicial structure. Paramount to that effort is preserving the integrity of state courts "to perform the separate function of providing a forum competent to vindicate any constitutional objection interposed against [state] policies." *Huffman*, 420 U.S. at 605; *see also Steffel v. Thompson*, 415 U.S. 452, 461-62 (1974). The Court of Appeals decision has denied the California state courts an opportunity to provide a "narrowing construction[] [of the ALRB order] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore*, 442 U.S. at 429-30; *see also Pennzoil*, 481 U.S. at 13; *Trainor*, 431 U.S. at 446.

Furthermore, without a final determination by the California state courts on the application of the ALRA, a decision by a federal court on the preemption question is premature, for,

> [w]hen federal courts interpret state statutes in a way that raises federal constitutional questions, "a constitutional determination is predicated upon a reading of the statute that is not binding on state courts and may be discredited at any time--thus essentially rendering the federal court decision advisory and the litigation underlying it meaningless."

Pennzoil, 481 U.S. at 12, *quoting Moore*, 442 U.S. at 428. The Court of Appeals' decision, at bottom, manifests a profound distrust of state courts' ability to adjudicate federal issues fairly--a mistrust which has resulted in an unseemly and unnecessary disruption of otherwise orderly administrative proceedings.

This case thus warrants review so the Court can clarify (1) that the determination of an "important state interest" under *Younger* does not involve a weighing or consideration of arguably competing federal interests, and (2) that a claim of

federal preemption, unaccompanied by a demonstration of why state remedies are inadequate, is insufficient to except the case from the operation of *Younger*. Given a growing inconsistency in the application of *Younger* by the lower courts, this case also presents the Court with an opportunity to reaffirm the principles of equity, comity, and federalism that underlie the *Younger* doctrine.[4]

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[4]The amici states are concerned that the Court of Appeals' rationale is not confined to state administrative proceedings and, as several recent decisions in the ninth and tenth circuits demonstrate, seems to be gaining currency. For example, in *Sycuan Band of Mission Indians v. Roache*, 38 F.3d 402 (9th Cir. 1994), the Court of Appeals refused to abstain in deference to an ongoing state criminal prosecution of several Sycuan tribal members for violating state gaming laws because "the threshold issue of the State [of California's] jurisdiction to prosecute is a matter of federal, not state, law." *Id.* at 409. Relying on *Sycuan Band*, the Court of Appeals in *Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428 (9th Cir. 1994), *pet. for writ of cert. pending*, No. 94-1728, again refused to abstain in favor of an ongoing state criminal prosecution, explaining that "[b]ecause the jurisdictional question is paramount and federal, *Younger* abstention would not be appropriate here." 43 F.3d at 432; *see also Confederated Salish & Kootenai Tribes v. Simonich*, 29 F.3d 1398 (9th Cir. 1994); *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989).

CONCLUSION

The amici States respectfully urge this Court to grant the petition for writ of certiorari.

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No. 94-1684

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

AGRICULTURAL LABOR RELATIONS BOARD, J. ANTONIO BARBOSA, INVONNE RAMOS RICHARDSON, and LINDA A. FRICK,

Petitioners,

V.

BUD ANTLE, INC. dba BUD OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from enjoining state administrative proceedings which are adjudicatory or quasi-judicial in nature.

2) Whether the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), prohibits federal courts from deciding cases in which state proceedings are ongoing, implicate important state interests, and provide an adequate opportunity to raise federal questions.

3) Whether the preemption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), applies when a state administrative agency having jurisdiction over labor relations involving "agricultural laborers" asserts jurisdiction over unfair labor practices involving employees "arguably" subject to the jurisdiction of the National Labor Relations Board.

4) Whether a private party may bring an action in federal court seeking injunctive relief against a state agency on the basis of preemption by the National Labor Relations Act.

RULE 29.1 STATEMENT

Respondent Bud Antle, Inc. dba Bud of California is a wholly owned subsidiary of Dole Fresh Vegetables, Inc., which is itself a wholly owned subsidiary of Dole Food Company, Inc.

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Respondent Bud Antle, Inc. dba Bud of California ("Respondent", "Bud" or "Company") hereby respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioners Agricultural Labor Relations Board, J. Antonio Barbosa, Ivonne Ramos Richardson, and Linda A. Frick, ("ALRB") seeking review of the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on January 17, 1995. The Ninth Circuit's opinion is reported as *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994), and is reproduced in the Appendix ("A.") to Petitioners' Petition at pages 1 through 40.

RESPONSE TO STATEMENT OF THE CASE

It is possible to glean from the Petition's Statement of the Case that the underlying dispute between ALRB and the Company revolves around whether employees who work in the Company's vegetable cooling plants in California (the "Bargaining Unit") were "employees" within the meaning of Section 2(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 152(3), or "agricultural laborers" excluded from the coverage of the NLRA pursuant to the same statutory provision, in 1989. However, the Petition's Statement of the Case is deficient in at least three important respects. First, it fails to discuss the applicable standards used by the National Labor Relations Board ("NLRB") and approved by this Court for determining "agricultural laborer" status, and therefore the extent of the NLRB's exclusive jurisdiction over unfair labor practice charges, and how the preemption doctrine articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) ("*Garmon*") and its progeny impacts on state regulation of labor disputes which involve employees "arguably" within the NLRB's jurisdiction. Second, ALRB fails to acknowledge that the blame for the failure of Fresh Fruit & Vegetable Workers' Local 78-B

("Union") to timely file charges involving the Bargaining Unit with the NLRB lies with the Union itself. Finally, and most importantly, ALRB's Petition fails to mention that ALRB has continued to assert jurisdiction over unfair labor practice charges involving the Bargaining Unit despite repeatedly being advised by the NLRB, both explicitly and implicitly, that the employees in the Bargaining Unit are and were covered by the NLRA. It is these matters which were omitted from ALRB's Statement which compel denial of the Petition.

I. "Agricultural Laborer" Status Under The NLRA And *Garmon* Preemption.

The NLRA, 29 U.S.C. 141 *et seq.*, is a comprehensive federal statutory scheme regulating collective bargaining between employers and the labor organizations that represent their employees. However, the NLRA specifically excludes "agricultural laborers" from coverage: "[t]he term 'employee'... shall not include any individual employed as an agricultural laborer . . ." (29 U.S.C. 152(3)). Although the NLRA does not define the term "agricultural laborer", Congress has continuously included in the NLRB's annual appropriation act a proviso directing the NLRB to apply the definition of "agriculture" found in Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(f). *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 300 n.6 (1977).

Section 3(f) of the FLSA defines "agriculture" as "farming in all its branches . . . and any practices . . . performed by a farmer or on a farm . . . ". Under both this definition and the NLRA, employees working in "off the farm" facilities such as the vacuum cooling plants where the Bargaining Unit employees involved herein work are considered "agricultural laborers" only if they are employed by the "farmer" of substantially all the commodities

processed through the facilities. *Camsco Produce Co.*, 297 NLRB 905 (1990); *D'Arrigo Bros. Co. of California*, 171 NLRB 22 (1968). If the employer is not the "farmer" of the commodities, the employees are not "agricultural laborers" and the NLRB has exclusive jurisdiction over unfair labor practice charges involving the employees. *Employer Members of Grower-Shipper Vegetable Assn.*, 230 NLRB 1011, 1012-1013 (1977), *overruled on other grounds, Camsco Produce, supra.* And as most relevant here, the NLRB, the Department of Labor, and this Court all agree that an employer is not a "farmer" even if it harvests crops grown by its agent and in which it has an investment interest, or otherwise handles agricultural commodities which are grown by a partnership in which the employer is a partner. 29 C.F.R. 780.131-780.132; *Bayside Enterprises v. NLRB, supra*; *Waldo Rohnert Co. v. NLRB*, 322 F.2d 46 (9th Cir. 1963); *Employer Members, supra*; *Green Giant Co.*, 223 NLRB 377 (1976); *Norton & McElroy Produce, Inc.*, 133 NLRB 104 (1961).

The determination of whether the Company is the "farmer" of the commodities handled by the Bargaining Unit is therefore of critical importance in deciding whether ALRB usurped the statutory jurisdiction of the NLRB when it asserted jurisdiction over the merits of the Union's unfair labor practice charges. This is so because under *Garmon* and its progeny the NLRA preempts state regulation of conduct which is even "arguably" subject to the unfair labor practice jurisdiction of the NLRB. *See, i.e., Garmon*, 359 U.S. at 244-245; *Garner v. Teamsters, Chauffeurs and Helpers Local Union*, 346 U.S. 485 (1953); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). As the Court stated in *Garmon*, "[w]hen an activity is arguably subject to 7 or 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted" (359 U.S. at 244-245).

Nor can a state tribunal assume jurisdiction over "arguable" unfair labor practices because the limitations period of the NLRA (29 U.S.C. 160(b)) has expired. If the controversy presented to the state tribunal could have been, but was not, presented to the NLRB, the "state's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the NLRB which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid" (*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978)).

Additionally, NLRA preemption must be respected even if the NLRB fails or refuses to decide whether the activity at issue is protected or prohibited or, as more relevant here, whether certain employees are covered by the NLRA or excluded as "agricultural laborers". As explained in *Garmon*:

> To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity . . . . [T]he Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating. It follows that the failure of the Board to define the legal significance under the Act of a particular activity

> does not give the States the power to act. *In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction.* The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss*.
>
> In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of 7 or 8 of the Act, the State's jurisdiction is displaced.

Id., 359 U.S. at 245-246 (emphasis added).

"Arguable" preemption also applies to determinations involving "employee" status under Section 2(3) of the NLRA. For example, in *International Longshoremen's Asso. v. Davis*, 476 U.S. 380 (1986), the NLRA preemption issue turned on whether the respondent was an "employee" or a "supervisor" under the Act. "We should inquire, then, whether Davis was *arguably* an employee rather than a supervisor. If he was, the issue was to be initially decided by the NLRB, not the state courts." *Id.* at 394 (emphasis added). The Court then went on to reject the union's claim that Davis was not a supervisor merely because the NLRB had never determined that he was a supervisor. The Court held that under *Garmon*, "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the Board and only if the Board decides that the conduct is *not* protected or prohibited may the court entertain the litigation" (*id.* at 397) (emphasis added). *See also*

International Asso. of Bridge, Structural & Ornamental Iron Workers Union v. Perko, 373 U.S. 701, 705-706 (1963) (Court holds that since plaintiff was "arguably" an "employee" within the meaning of NLRA 2(3), his state court complaint was preempted by *Garmon*).

From the above, it is evident that if the Bargaining Unit is composed of employees "arguably" covered by the NLRA (that is to say, if the Company is "arguably" *not* a farmer), then ALRB's assertion of jurisdiction violated the preemption principles of *Garmon*. As succinctly stated by the Ninth Circuit: "Even if Bud's workers are only *arguably* not agricultural laborers, the company's conduct is at least arguably prohibited [by the NLRA] . . . . Thus, the question before us is whether Bud's workers are arguably 'employees' rather than 'agricultural laborers'." A. at 28 (emphasis original).

II. The Union Made A Conscious Decision To Avoid The NLRB.

ALRB's Petition maintains that the collective bargaining relationship between Bud and the Union would never have come about without the passage of the California Agricultural Labor Relations Act ("ALRA"), Cal. Labor Code 1140 *et seq.*, in 1975 and ALRB's 1976 certification of the Union as the representative of the Bargaining Unit. P. at 3-4, 20. However, the true facts are that Bud and the Union's collective bargaining relationship began in the early 1970s, *before* the ALRA was passed and the Union was issued a certification by ALRB (CR 11 (exh. 21 at 7)).[1] Moreover, in 1982, six years *after* the Union's ALRB certification but seven years *before* the Union filed its charges with ALRB, the Union admitted that the Bargaining Unit was covered by

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[1] "CR" refers to the number designated for the referenced document by the district court clerk's docket sheet.

the NLRA when the Union answered an unfair labor practice complaint issued against it by the NLRB. CR 48 (exh. 41-42).

ALRB's Statement of the Case does correctly state that the Union filed "backup charges" with the NLRB in September 1991, and that those charges were dismissed by the NLRB because they were untimely. P. at 5. ALRB then claims that the Court must grant certiorari in this case because to decide otherwise "will mean that the unfair labor practices will never be litigated in any forum" (*id.* at 10). However, ALRB's Petition fails to recite the facts which explain that the Union has only itself to blame for this state of affairs.

While it is true that Bud filed unfair labor practice charges against the Union with ALRB in September 1989, by December 1989 it realized that the Bargaining Unit was actually covered by the NLRB and so notified ALRB. Bud subsequently withdrew its own ALRB charges and in mid-January 1990 re-filed those charges with the NLRB. *The Union has admitted in the proceedings below that its receipt of those NLRB charges placed it on notice that Bud contended the NLRB, not ALRB, had jurisdiction over the Bargaining Unit.* CR 19 (exh. 36). Thus, the Union could have timely filed charges with the NLRB at that time alleging as unfair labor practices all the conduct placed at issue by the Union's ALRB charges. Instead, the Union waited more than 20 months to file its parallel charges with the NLRB, apparently because it believed ALRB would be a much friendlier audience for its charges than would the NLRB.[2]

Finally, the NLRB's general counsel has ruled that the delay relied on by ALRB in support of its Petition was

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[2] The Union was right. ALRB's bias against Bud is discussed below with respect to *Younger* abstention (*post* at 21-22).

caused by the Union, not Bud. In dismissing the Union's NLRB charges the NLRB's general counsel wrote:

> As for incidents which took place in 1989 and 1990, it could not be established that the Union's failure to file a charge within six months after those events took place was attributable to any conduct on the part of either the Employer or of this agency which would justify tolling the Section 10(b) period. Rather, the Employer filed charges against the Union and petitions concerning the unit employees in question with this agency in 1990, including the petition in Case No. 21-UC-350 where the Board asserted jurisdiction concerning these employees. Therefore, contrary to [the Union's] contention on appeal, the Union was in a position to file a timely charge concerning the events occurring outside the instant Section 10(b) period. [CR 11 (exh. 29)].

The facts set forth above must be kept in mind when the Court reads the "appeals to emotion" which are made in ALRB's Petition, and which most certainly will be made in the anticipated *amicus* brief of the Union.

III. The NLRB Repeatedly Told ALRB It Did Not Have Jurisdiction, But ALRB Would Not Listen.

Bud would not have been forced to resort to the federal courts, and this Petition would not now be here, if ALRB would have, just once, listened to the NLRB when deciding whether it could properly assert jurisdiction over the merits of the Union's charges. Apparently ALRB does not want this Court to hear the NLRB either, because the Petition does not mention much of what the NLRB said. Bud will now fill in the gaps.

In September 1990 Bud filed a unit clarification petition with the NLRB seeking a NLRB determination that the employees in the Bargaining Unit were "employees" within the meaning of Section 2(3) of the NLRA, and therefore covered by the federal act rather than the ALRA. While Bud's petition was pending before the NLRB, ALRB filed a request for an advisory opinion with the NLRB. ALRB's request contended that Bud's unit clarification petition was "mischievous" and frustrated collective bargaining, and asked that the NLRB permit ALRB to assert jurisdiction over the Union's charges. NLRB dismissed ALRB's request. Bud then filed a motion with ALRB asking ALRB to suspend its proceedings on the Union's charges until the NLRB determined in the unit clarification case whether the Bargaining Unit was covered by the NLRA. ***ALRB denied Bud's request to suspend the state proceedings.*** CR 11 (exh. 4, 16-19).

The NLRB unit clarification hearing began in February 1991 and concluded in March 1991. ALRB appeared as *amicus curiae* and urged the NLRB not to issue a decision which would preclude ALRB from asserting jurisdiction over the Union's charges. For its part, Bud introduced evidence establishing that Bud had never been the "farmer" of any of the commodities handled by the Bargaining Unit during the period from January 1988 to date. CR 11 (exh. 20; 5).

On May 1, 1991 the NLRB's regional director issued a unit clarification decision concerning the Bargaining Unit. As relevant here, the unit clarification decision held that Bud was *not* the "farmer" of the commodities handled by the Bargaining Unit during the period of time covered by the Union's charges, and that the Bargaining Unit employees are therefore "employees" covered by the NLRA.

> Thus, in the present scenario, I conclude that the Employer-Petitioner is not a "farmer" by virtue of the fact that it germinates seeds, transplants crops, or harvests crops. The record is clear that the actual cultivation of the crops is performed by the growers, and that the growers retain the risk and the responsibility for the crops until they are harvested. Accordingly, *since the Employer-Petitioner is not a "farmer," the contractual Bargaining Unit employees are not agricultural employees.* [CR 11 (exh. 21 at 18) (emphasis added)].

But despite the fact that the record established that Bud had operated identically with respect to "non-farmer" and Bargaining Unit "employee" status since at least January 1988, the decision limited its specific clarification to the period of time during which the unit clarification hearing took place (February and March 1991) and thereafter. The NLRB's regional director reasoned that since the status of the Bargaining Unit prior to the time of the NLRB hearing was then before ALRB by virtue of the Union's ALRB charges, it would not be appropriate to address whether ALRB had jurisdiction to continue prosecution of those charges:

> [A] hearing before the ALRB was commenced on April 16, 1991, in which the Employer-Petitioner contends that it is not under the ALRB's jurisdiction. The effect of the clarification herein on the proceedings before the ALRB should be determined in that proceeding by the ALRB and the reviewing courts. *Thus, the question as to whether the ALRB has jurisdiction to continue prosecution of those charges currently before it is not*

appropriately addressed herein. [A. at 9-10 (emphasis added)].[3]

Immediately upon receiving the unit clarification decision Bud requested that ALRB dismiss the Union's unfair labor practice charges because the NLRB's decision clearly established that the Bargaining Unit was covered by the NLRA at all relevant times. ***ALRB denied Bud's request.*** CR 11 (exh. 6). Bud then asked ALRB to bifurcate its proceedings so that the jurisdictional issue would be decided before the parties were required to litigate the merits of the Union's charges. ALRB's administrative law judge denied the request, and Bud filed an application for a temporary restraining order with the U.S. District Court for the Southern District of California to enjoin ALRB from proceeding on the Union's charges pending the termination of all proceedings before the NLRB relating to the unit clarification petition.[4] Upon being notified of the application, ALRB ordered that the state hearing be bifurcated. As a result, the action then pending before the district court was dismissed by stipulation. CR 11 (exh. 6, 31-34).

Meanwhile, Bud filed a separate unit clarification petition with the NLRB requesting that the NLRB clarify the Section 2(3) "employee" status of its harvest and harvest support employees represented by Teamsters Local 890. The entire record created before the ***ALRB*** relevant to Bud's "farmer" status was admitted into evidence for consideration by the NLRB. The NLRB *again* found that Bud was not the

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[3] The last sentence of the regional director's footnote does not appear anywhere in the Petition, but was an important factor in the Ninth Circuit's rejection of ALRB's argument that it was not preempted from asserting jurisdiction over the Bargaining Unit (A. at 34-40).

[4] Those proceedings terminated in August 1991 when the NLRB denied all requests for review of the regional director's decision.

"farmer" of any of the commodities handled by the Bargaining Unit, and concluded that all Bud harvesting employees other than those actually engaged in removing the growing crops from their attachment to the soil are "employees" covered by the NLRA, not "agricultural laborers". CR 11 (exh. 23).

As referenced above, the Union also filed an unfair labor practice charge with the NLRB in September 1991 which paralleled its ALRB charges. The NLRB dismissed the Union's charge because it was untimely -- not because the NLRB lacked subject matter jurisdiction.

On September 16, 1992 ALRB issued an "Interlocutory Decision On Jurisdiction", reported at 18 ALRB No. 6, affirming its administrative law judge's December 1991 decision asserting jurisdiction over the Bargaining Unit and the merits of the Union's unfair labor practice charges. ALRB's decision *rejects* the NLRB's finding that Bud was not the "farmer" of the commodities handled by the Bargaining Unit. It also *rejects* the proposition that ALRB is required to follow decisions of the NLRB in deciding issues relating to "agricultural laborer" status. Applying a legal analysis which ALRB *admitted* the NLRB had *never* used in deciding issues of "agricultural laborer" status, ALRB held that Bud is a "farmer" and that ALRB "has jurisdiction over all aspects, both substantive and remedial, of the unfair labor practices alleged in [the Union's ALRB charges]". ALRB also determined that the NLRB's dismissal of the Union's NLRB charges filed in September 1991 was not "equivalent to a ruling on jurisdiction", and therefore was not relevant in deciding the preemption issue raised by Bud. ALRB's decision *did not even reference* the NLRB's unit clarification decision involving Bud's harvest employees, even though ALRB was aware that the NLRB's finding therein that Bud was not a "farmer" *was based on the identical record as that before ALRB when it reached the*

opposite conclusion. CR 11 (exh. 9 at 60-87; exh. 10 at 11 (n.8), 16, 18, 24-26).

Bud immediately filed a petition for writ of review of ALRB's decision with the California court of appeal. However, because ALRB called its decision "interlocutory", ALRB prevented Bud from obtaining state court review. A. at 11. It was at this point that Bud was forced to resort to the federal courts, and filed its complaint seeking declaratory and injunctive relief based on NLRA preemption, as well as damages pursuant to 42 U.S.C. section 1983.

Teamsters Local 890 subsequently requested that the NLRB reconsider its finding that Bud was not a "farmer", made in the unit clarification proceeding involving Bud's harvest employees, in light of ALRB's decision finding that Bud is a "farmer". The NLRB took the opportunity provided by the Teamsters' request to articulate, in a formal decision, the NLRB's concern over the conflict between ALRB's decision and the NLRB's consistent findings that Bud is not a "farmer", noting that "[s]uch a Federal-state jurisdictional conflict raises concerns which go beyond the immediate interests of the parties and should not go unaddressed." *Bud of California*, 311 NLRB 1352 (1993). The NLRB's decision specifically criticized the analysis employed by ALRB in asserting jurisdiction over the Bargaining Unit, finding that ALRB's "farmer" analysis was inconsistent with well established NLRB precedent and this Court's decision in *Bayside*. *Id.* at 1353. Accordingly, the NLRB denied the Teamsters' request on the merits (*id.*).

Upon notification of the NLRB's *Bud of California* decision, Bud filed a motion with ALRB asking it to reconsider its decision asserting jurisdiction over the Bargaining Unit in light of the NLRB's pointed criticism of ALRB's "farmer" finding. ALRB responded by declaring

that "the decision of the NLRB now proffered by Bud is neither relevant to nor in conflict with 18 ALRB No. 6".

Thus, by its decision in the unit clarification case involving the Bargaining Unit, its decision clarifying that the bulk of Bud's harvesting employees are covered by the NLRA, and again in its *Bud of California* decision, the NLRB made clear to ALRB that Bud is not a "farmer" and that ALRB therefore has no jurisdiction over unfair labor practice charges involving the Bargaining Unit. The NLRB sent this same message to ALRB, albeit implicitly, when it dismissed the Union's NLRB charge for reasons other than lack of NLRA jurisdiction. A. at 38. Based on these NLRB pronouncements, Bud repeatedly requested ALRB to discontinue its proceedings. ALRB adamantly refused to do so, again and again finding that it was free to ignore the NLRB's rulings. Thus, Bud had no choice but to seek relief from the federal courts. That is why the court below enjoined ALRB's proceedings. That is also why this Court should deny ALRB's Petition.

REASONS TO DENY THE WRIT

The Ninth Circuit's conclusion that the Anti-Injunction Act, 28 U.S.C. 2283, does not apply to state administrative proceedings is consistent with the unambiguous language of that statute and the decisions of the federal courts. The Anti-Injunction Act issue is also of marginal significance given the abstention doctrine set out in *Younger v. Harris,* 401 U.S. 37 (1971) (*"Younger"*) and its progeny. There is no dispute between ALRB and the Ninth Circuit over the test to be used in applying *Younger* abstention, ALRB simply contends that the test was misapplied in this specific case. Moreover, the Ninth Circuit's finding that *Younger* abstention did not operate in this case is consistent with the decisions of this

Court and the policies underlying that doctrine. ALRB's contention that *Garmon* preemption should not apply to its actions because of its role in regulating labor relations involving agricultural laborers was not raised below, and is directly contrary to *Garmon* and the need for federal preemption of state conduct seeking to regulate labor relations of employers engaged in interstate commerce. Finally, the Ninth Circuit's conclusion that a private party may bring an action in federal court based on NLRA preemption simply follows this Court's cases finding that such actions are appropriate. In sum, the only thing remarkable about this case is ALRB's unbending resolve to require Bud to answer for alleged unfair labor practices over which ALRB clearly is without subject matter jurisdiction. ALRB's Petition should be denied in its entirety.

I. The Anti-Injunction Act Means What It Says.

ALRB's Petition contends that this Court should review the Ninth Circuit's finding that the Anti-Injunction Act ("AIA"), 28 U.S.C 2283, applies only to state courts and does not bar injunctive relief directed at state administrative proceedings. However, neither the language of the statute itself nor the case law developed thereunder support ALRB's contention. Moreover, the issue raised by ALRB is of marginal importance to the proper functioning of the federal courts.

The AIA provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The language of the statute could not be clearer -- it only prohibits injunctions directed to proceedings in a state *"court"*. Pertinent case law confirms that the statute has no applicability whatsoever to *administrative* proceedings. *Mississippi Railroad Commission v. Illinois Central Railroad Company*, 203 U.S. 335, 341 (1906) (AIA's predecessor statute does not apply to injunctions directed to an administrative agency, even if the agency's proceedings may result in state court proceedings); *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 824 (7th Cir. 1990) (the AIA is inapplicable where the requested injunction would not interfere with state *court* proceedings); *Engleman v. Cahn*, 425 F.2d 954, 958 (2d Cir. 1969), *cert. denied*, 397 U.S. 1009 (1979) ("the anti-injunction statute, 28 U.S.C. 2283, is inapplicable since it relates only to *pending* state *court* proceedings") (emphasis original); *Matson Navigation v. Hawaii Pub. Util. Comm'n*, 742 F. Supp. 1468, 1478 (D. Hawaii 1990) (*Younger* applies to administrative proceedings which are judicial in nature but AIA does not).

ALRB seeks to avoid the statutory language and cases cited above by arguing that the Court's "suggestion" in *Gibson v. Berryhill*, 411 U.S. 564 (1973), that the AIA "may" apply to administrative agencies as well as courts should now be confirmed as the law. P. at 8. However, ALRB's reliance on *Gibson* is misplaced. The Court in *Gibson* merely stated, in a footnote, that it was not required to decide in that case whether the AIA applies to proceedings before a state administrative body (*Gibson* at 573 n.12). The Court most certainly did not "suggest" the AIA *would* apply. Neither the Court's footnote in *Gibson* nor the fact that a number of federal courts have not been required to squarely address the issue raised by ALRB provide sufficient grounds to grant ALRB's Petition on this issue.

Additionally, even accepting as true ALRB's assertion that "[t]he instant case is the first since *Gibson* in which

precisely the situation referred to in the *Gibson* footnote is presented" (P. at 10), the statement actually mitigates *against* ALRB's Petition. If this issue only arises once every 20 years, it is hardly one of significance worthy of this Court's attention. Moreover, and as noted in the Ninth Circuit's opinion below, a literal interpretation of the AIA does not leave the federal courts free to unduly interfere with legitimate state administrative proceedings which are judicial in character given this Court's *Younger* abstention doctrine. A. at 23. Finally, even if the AIA did apply, injunctive relief is still appropriate here under the "effectuation of judgment" exception to the AIA, as the court below properly granted Bud's motion for summary judgment based on NLRA preemption.

In sum, all federal courts which have addressed the scope of the AIA have held that it applies only to state *court* proceedings. The cases are consistent with the unambiguous language of the statute. That the AIA issue raised by ALRB has been dormant for over two decades illustrates that it is of marginal significance to the proper functioning of the federal courts. Review of this issue is unwarranted.

II. The Ninth Circuit Properly Applied The Law In Concluding That *Younger* Abstention Did Not Preclude The Exercise Of Federal Jurisdiction.

ALRB's Petition does not suggest that the Ninth Circuit's opinion in this case applied the incorrect legal standard in dismissing ALRB's argument that the federal court should have refused to exercise its jurisdiction on the basis of *Younger* abstention. In fact, the Ninth Circuit and ALRB agree that abstention on the basis of *Younger* is appropriate where (1) there are ongoing state proceedings; (2) the proceedings implicate important state interests; and (3) the proceedings provide an adequate opportunity to raise federal questions (A. at 24-25; P. at i, 11). ALRB simply disagrees

with the Ninth Circuit's application of *Younger* to the specific facts presented in this particular case (P. at 12-13). A litigant's disagreement with the manner in which a court of appeal has applied settled law to a particular fact situation involving only that party, where reoccurrence is highly unlikely, does not warrant review by this Court. ALRB's Petition should be summarily denied for this reason alone.

Moreover, it is clear that the Ninth Circuit below properly applied *Younger*. In *New Orleans Public Services, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), the Court noted[5] that a facially conclusive claim of federal preemption may render *Younger* abstention inappropriate (*id.* at 367). The Ninth Circuit found below that no factual inquiry was necessary to decide the NLRA preemption issue presented here (A. at 26 n. 16). ALRB's Petition does not challenge this finding. In fact, ALRB's Petition implicitly concedes the presence of a facially conclusive claim of NLRA preemption (P. at 11-12). Nonetheless, ALRB contends that the Court's pre-*NOPSI* decisions in *Younger* and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), should be extended so that abstention operates even in the face of a facially conclusive claim of federal preemption unless "the very integrity of the state proceedings [is] called into question" (P. at 16).

ALRB's argument goes much further than this Court ever has. Moreover, ALRB's argument if accepted would allow the principle of comity to permit a state agency to interfere indefinitely with a labor dispute which Congress and *Garmon* clearly commit to the exclusive jurisdiction of the

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[5] *NOPSI* held that *Younger* abstention did not apply because the proceeding involved was legislative rather than judicial (491 U.S. at 371). Accordingly, *NOPSI's* discussion of the "legitimate state interests" component of *Younger* abstention was unnecessary to the decision.

NLRB. Additionally, Bud's complaint and the conduct of ALRB which required that Bud pursue that complaint does in fact call into question the integrity of ALRB's proceedings.

ALRB does not explain why the Court found it necessary in *NOPSI* to spell out the reasons a facially conclusive preemption claim was *not* present in that case (*NOPSI*, 491 U.S. at 367) if the existence of such a claim was not relevant to *Younger* abstention anyway. And unlike the situation in *NOPSI* (*see id.*), ALRB here *is* clearly interfering with Bud's rights under the NLRA and *is* violating the preemptive effect of the NLRA. ALRB also *has* questioned the "validity" of the NLRB's unit clarification decision and the "prudence" of its jurisprudence analyzing "agricultural laborer" issues (*id.*). In fact, ALRB acknowledges that its assertion of jurisdiction over the Bargaining Unit is contrary to both. A. at 31-33. Moreover, ALRB has consistently criticized and disregarded every action by the NLRB establishing that ALRB is preempted by the NLRA from asserting jurisdiction over the Bargaining Unit. Thus, ALRB's assertion of jurisdiction over the merits of the Union's unfair labor practice charges is "directly . . . foreclosed by the federal statute . . . and the case law applying it" (491 U.S. at 367). ALRB's conduct is therefore "flagrantly unlawful" for purposes of *Younger* abstention analysis. *Id.* The Ninth Circuit correctly applied *NOPSI* in determining that *Younger* abstention was inapplicable in the particular facts of this case.

The fact that Bud's claim of NLRA preemption is facially conclusive also answers ALRB's contention that the State of California's interest in regulating collective bargaining involving "agricultural laborers" mandates *Younger* abstention. As the Ninth Circuit noted below, "even if there is a strong state interest in regulating agricultural labor relations in general, that interest is hardly so strong as to require us to conclude that it extends to the

farthest conceivable limits -- to off-the-farm work performed by non-farmers. To the contrary, in such cases, the strong policies of federal preemption are dominant." A. 34 n.20. Simply put, California's interest in regulating labor relations involving *field workers* is in no way impacted by the injunction issued in this case. ALRB has asserted jurisdiction over unfair labor practices involving employees who work in a processing plant and whom the NLRB has repeatedly held are covered by the NLRA. Thus, ALRB is acting despite a total lack of subject matter jurisdiction. ALRB's conduct serves *no* legitimate state interest.[6]

To accept ALRB's argument would allow a state labor board to assert jurisdiction over unfair labor practice claims involving employees whom the NLRB has concluded are *not* "agricultural laborers", and therefore are completely outside of the state agency's subject matter jurisdiction, because labor relations involving employees who *are* agricultural laborers is a "legitimate state interest". This Court has never extended *Younger* to such a degree. Research fails to disclose any cases where this Court, or any other federal court, abstained on the basis of *Younger* even though the state court/agency was acting in the clear absence of jurisdiction over the subject matter of the state proceeding.[7]

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[6] ALRB's contention that in this case it simply "misinterpreted" the "murky and uncertain parameters of 'agriculture'" (P. at 17) is belied by ALRB's deliberate rejection of the NLRB's decisions involving Bud.

[7] In *Younger*, there was no question that the Superior Courts of California had jurisdiction over any criminal conduct which was alleged to have occurred within that state's borders, and therefore had subject matter jurisdiction over the prosecution of Harris. Similarly, in *Huffman* there was no question raised with respect to the Ohio Court of Common Pleas' subject matter jurisdiction over a civil nuisance action. In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), there was no question that the Ohio Civil Rights Commission had

(continued...)

And in this case ALRB *is* acting totally without subject matter jurisdiction because its proceedings are, without question, preempted by the NLRA. ALRB is adjudicating unfair labor practice charges involving "employees" subject to the exclusive unfair labor practice jurisdiction of the NLRB.

To extend the *Younger* doctrine to this case would make a mockery of comity and the basic principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule" (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *NOPSI*, 491 U.S. at 359. Indeed, it is disingenuous for ALRB to argue that the court below did not extend sufficient comity to ALRB when ALRB has spent the past four years thumbing its nose at the NLRB and this Court's *Garmon* jurisprudence. *Younger* abstention simply cannot operate where a federal plaintiff has presented a facially conclusive claim of NLRA preemption.

Moreover, even if ALRB was correct in the assertion that *Younger* abstention applies even in the face of a facially conclusive claim of federal preemption, *Younger* still should not be applied here because ALRB's proceedings are being conducted in bad faith. As noted, ALRB has continued to assert jurisdiction despite the undeniable existence of NLRA preemption. ALRB has admittedly disregarded NLRA precedent, the NLRB's unit clarification decision finding the Bargaining Unit is covered by the NLRA, the NLRB's many decisions finding Bud is not a "farmer", and the NLRB's *Bud of California* decision specifically criticizing the analysis

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(...continued)
jurisdiction over allegations of sexual discrimination against citizens of that state, and therefore had subject matter jurisdiction over the complaint filed against Dayton. In *NOPSI* the City Council of New Orleans had jurisdiction over intrastate utility rates, the subject matter of the proceeding involved therein.

used by ALRB in asserting jurisdiction over the Bargaining Unit, in its zeal to require Bud to answer to ALRB for its collective bargaining conduct. Given the existence of clear NLRA preemption, ALRB's purpose in pursuing these charges appears calculated to harass Bud because Bud has attempted to exercise its rights under the NLRA, not to make valid unfair labor practice findings.[8] ALRB is not conducting its proceedings "with any expectation of securing valid convictions, but rather [as] part of a plan . . . to harass" (*Younger*, 401 U.S. at 48) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965)). Thus, *Younger* abstention does not operate here even under the limited exceptions to that doctrine recognized by ALRB (P. at 16-17).[9]

Finally, ALRB's contention that *Younger* abstention should apply because the NLRB believes that this matter should proceed through the state courts (P. at 17-19) mischaracterizes the NLRB's position. ALRB's argument that the footnote of the unit clarification decision quoted above (*see ante* at 10-11) favors abstention was considered and rejected by the Ninth Circuit. A. at 34-37. As noted by the court, the regional director's footnote "merely stated that the issue of ALRB jurisdiction as of 1989 was not properly before her: 'the question as to whether ALRB has jurisdiction

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[8] The Section 1983 claims of Bud's complaint allege ALRB has asserted jurisdiction because Bud exercised its rights under the NLRA to engage in hard bargaining with the Union, to implement terms and conditions of employment at impasse, to lock out the Bargaining Unit pending the Union's acceptance of Bud's collective bargaining proposals, and because Bud has denied that the Bargaining Unit is subject to ALRB's jurisdiction.

[9] The court below did not pass on this issue because of its finding that Bud's NLRA preemption claim was facially conclusive.

to continue prosecution of those charges currently before it is not appropriately addressed herein'" (*id.* at 37).[10]

The NLRB's amicus brief filed with the Court of Appeal did suggest that *Younger* abstention was proper here. However, that contention was based on the NLRB's belief that because a "factual inquiry" is generally necessary to determine "agricultural laborer" status, this case did not present a facially conclusive claim of NLRA preemption. A. at 26 n.16. The erroneous assumption on which the NLRB's position was based[11] was also answered by the Ninth Circuit's opinion:

> [T]he preemption issue in this case requires *no* further factual inquiry. The NLRB's decisions in cases involving the same company, issue, and unit make it clear by themselves that the ALRB's jurisdiction over the Bargaining Unit is preempted.

Id. (emphasis original).

In sum, because NLRA preemption of ALRB's assertion of jurisdiction over unfair labor practice charges involving the Bargaining Unit is facially conclusive, the court below properly found that, in the specific facts of this case, *Younger* abstention is not appropriate. This must be so, because surely *Younger* abstention cannot be read so broadly as to require Bud to endure more years of litigation before a state agency which is acting in the complete absence of subject matter jurisdiction and which has so flagrantly

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[10] As noted above, the sentence from the regional director's decision quoted by the court's opinion is omitted from ALRB's various versions of the "pertinent parts" of that footnote (*see* P. at 5, 18).

[11] NLRB's amicus brief candidly admitted that NLRB has no expertise on *Younger* abstention.

violated the preemptive effect of the NLRA before Bud may ask a federal court to resolve issues of federal law, and then only by discretionary review in this Court. Such a result is not comity – it is abdication. Given the egregious and blatant nature of ALRB's conduct, the court below properly refused to abstain from asserting its jurisdiction. The egregious and blatant nature of ALRB's disregard for NLRB preemption also makes this case one in which the *Younger* abstention issue turns on the peculiar facts of the case. Thus, review by this Court is not warranted.

III. ALRB's Argument That *Garmon* Preemption Should Not Apply Is Contrary To Thirty Five Years Of NLRA Preemption Jurisprudence.

ALRB's Petition asks whether *Garmon* should apply where the parties to the state proceeding can "reasonably be said to be . . . outside the jurisdiction of the National Labor Relations Act" (P. at i). However, the question posed by ALRB cannot be raised in the context of this case. The NLRB's decisions consistently holding that Bud is *not* a "farmer" and that the Bargaining Unit *is* covered by the NLRA make the contention that the Bargaining Unit is not covered by the Act untenable. It cannot "reasonably be said" the Bargaining Unit is outside of NLRA jurisdiction.

Correctly stated, the issue is whether *Garmon* applies when a state administrative agency having jurisdiction over labor relations involving "agricultural laborers" asserts jurisdiction over unfair labor practices involving employees "arguably" subject to the jurisdiction of the NLRB (*ante* at i). *Garmon* does.

Moreover, ALRB never contended before either the district court or the Ninth Circuit that *Garmon* did not apply to its actions in this case. Instead, it "argue[d] only that the NLRB somehow vested the state board with jurisdiction to

resolve the unfair labor practice charges that form the basis of this case" by virtue of the footnote in the NLRB's unit clarification decision discussed above. A. at 33-34. Since the *Garmon* issue now raised by ALRB's Petition was not passed on by the courts below, it cannot be urged before this Court. *See, i.e., City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (n.5) (1989).

On the merits, the essence of ALRB's argument is that *Garmon* preemption should not apply because the states have power to police "agricultural labor relations" and the determination of what constitutes "agriculture" under the FLSA is "problematic". P. at 20-26. ALRB's argument must be rejected for a number of reasons, all of which provide an independent reason for denying ALRB's Petition.

First, ALRB's argument confuses the concept of "agricultural employer" and "agricultural laborer." That the NLRA governs labor relations in the "agricultural sector" of the economy cannot be denied. As this Court wrote in *Bayside*, "An employer's business may include both agricultural and nonagricultural activities. Thus, even though most of the operations on a sugar plantation are agricultural, persons employed in the plantation's sugar-processing plant are not 'agricultural employees.'" *Bayside Enterprises, supra*, 429 U.S. at 301. In fact, the NLRB has repeatedly asserted jurisdiction over Bud as "an employer engaged in commerce within the meaning of the Act" (CR 11 (exh. 21 at 1)).

Contrary to ALRB's assertion, Congress did not "choose to exclude agriculture from the NLRA" (A. at 24). Congress chose only to exclude "agricultural laborers", as defined by the NLRB in its decisions interpreting the "agricultural laborer" exemption under Section 2(3) of the NLRA, from the coverage of the federal act. And since the NLRB has unquestionable jurisdiction over unfair labor practices involving the Bargaining Unit despite their handling of

agricultural commodities, there is sharp conflict between the NLRA and ALRB's assertion of jurisdiction. Indeed, this conflict caused the NLRB to issue its *Bud of California* decision discussed above.

ALRB's contention that its function as a state labor board having jurisdiction over "agricultural laborers" allows it to reject the NLRB's standards for determining "farmer" and "agricultural laborer" status in deciding jurisdictional issues (P. at 23-24) is the very same argument rejected by this Court in both *Garner* and *Guss*. In both cases, state labor relations boards sought to regulate conduct which violated the NLRA. Finding that the NLRB must be entrusted with primary responsibility for the interpretation and application of the NLRA, and "to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*Garner, supra*, 346 U.S. at 490), this Court held in both *Garner* and *Guss* that the states were without jurisdiction to act.

If *Guss* and *Garner* do not make clear that ALRB's contention is without merit, *Garmon* and *ILA v. Davis* do. Both cases hold that "close calls" regarding "agricultural laborer" status must be made by the NLRB. As succinctly stated by the Ninth Circuit in rejecting ALRB's attempt to avoid the applicability of this Court's decision in *Bayside*,[12]

> We reject the ALRB's distinction. The ALJ's analysis is completely inconsistent with *Garmon*. *Garmon* preempts state jurisdiction over activity that is *arguably* protected or prohibited by the NLRA precisely in order to allow the *NLRB* to make the determination in the first instance and to ensure that "the danger of state interference with

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[12] ALRB makes this same argument in its Petition. P. at 23-24 n.14.

> national policy is to be averted." *Garmon*, 359 U.S. at 245. As the *Garmon* Court explained, "It is essential that these determinations be left in the first instance to the National Labor Relations Board. . . .

A. at 33 (emphasis original).

ALRB's contention that "[t]he applicability of the *Garmon* preemption doctrine to a situation where there is a comprehensive state regulatory scheme such as the ALRA has not been previously addressed by this Court" (P. at 26) is false. *Guss, Garner, Garmon, Davis,* and *Perko* all make clear that determinations of "agricultural laborer" status must be entrusted to the NLRB; that the NLRB's standards must be applied by other tribunals when determining whether the employees and conduct at issue are arguably covered by the NLRA; and that those tribunals are without jurisdiction when arguable preemption is shown.

In sum, ALRB's argument that labor relations in the agricultural sector are of "peripheral interest" to the NLRA and involve "interests so deeply rooted in local feeling" that *Garmon* does not apply has force only with respect to labor relations involving "agricultural laborers". Indeed, ALRB itself repeatedly references California's concern over labor strife *in the fields* of California (P. at 22, 24). However, the Bargaining Unit employees are *not* field workers. They work in off-the-farm processing facilities. They are *not* employed by a farmer. They are employed by "the largest volume producer of fresh vegetables in the United States" (P. at 4). *Garmon* preemption applies.

IV. That A Party May Seek Declaratory And Injunctive Relief On The Basis Of NLRA Preemption Is Well Settled.

ALRB's Petition urges that the Court grant certiorari in order to consider whether the NLRA confers a "private right of action" based on *Garmon* preemption. P. at i, 26-28. However, the real issue is whether a private party may seek declaratory and injunctive relief in the federal courts based on NLRA preemption. *Ante* at i. This question has already been answered in the affirmative by both this Court and all other federal courts which have considered the issue. Private litigants can and have routinely petitioned for relief from state actions which violate the preemptive scope of the NLRA.

In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court acknowledged the general rule that a litigant who seeks declaratory and injunctive relief from state regulation on the basis of preemption by a federal statute has presented a federal question over which the federal courts have jurisdiction pursuant to 28 U.S.C. 1331 (*id.* at 96 n.14). In *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), this Court specifically permitted a private party to proceed with a federal court action seeking declaratory and injunctive relief against the municipality-defendant on the basis of NLRA preemption (*id.* at 611, 620). *See also Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting) (a plaintiff may vindicate NLRA preemption claims by seeking declaratory and equitable relief in the federal district courts through their powers under such federal jurisdictional statutes as 28 U.S.C. 1331 and 28 U.S.C. 2201-2202).

Conclusive is this Court's decision in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986). In *Gould*, the district

court expressly held that the company's complaint alleging that a Wisconsin debarment scheme was preempted by the NLRA under *Garmon* stated "a valid cause of action over which this court may exercise jurisdiction" (576 F. Supp. 1290, 1293 (W.D. Wis. 1983)). This Court upheld the district court's finding of preemption without even suggesting the private party litigant therein lacked standing. Similarly, in *Building & Construction Trades Council v. Associated Builders and Contractors*, ___ U.S. ___, 113 S. Ct. 1190 (1993), the Court was untroubled by the court of appeal's finding that the private party plaintiff therein had stated a valid federal claim for declaratory and injunctive relief on the basis of NLRA preemption, although it did reject the plaintiff's claim on the merits. The federal courts of appeal have also routinely entertained the merits of NLRA preemption claims brought by private party litigants. *Babler Bros., Inc. v. Roberts*, 995 F.2d 911, 914-16 (9th Cir. 1993); *Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719, 724-25 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); *Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n*, 824 F.2d 672, 674 (8th Cir. 1987), *cert. denied*, 485 U.S. 989 (1988); *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987), *cert. denied*, 484 U.S. 830 (1987).

ALRB's argument that to allow private party litigants to challenge state regulation on the basis of *Garmon* preemption will do violence to a uniform scheme of labor relations (A. at 27, 28) is wholly without merit. Not only is ALRB's position contrary to the cases cited above, it is also contrary to the view of the NLRB as expressed in its amicus brief filed with the Ninth Circuit. By its brief, NLRB noted that allowing a private party to bring an action in federal court asserting that state proceedings are preempted by the NLRA serves the goal of uniform application of labor laws. A. at

20. Here again is another example of ALRB ignoring the NLRB when ALRB disagrees.

Finally, ALRB's reliance on *Cort v. Ash*, 422 U.S. 66 (1975), is misplaced. *Cort* articulates the test for determining whether a federal statute creates a private right of action *for damages*. *Cort* has nothing to do with an action for declaratory and injunctive relief based on preemption by federal law, the situation involved in this case. Moreover, even if *Cort* were applicable, *Cort supports* the viability of a complaint based on NLRA preemption. A. at 20 n. 13. The Court need not expend its resources reviewing the Ninth Circuit's unremarkable conclusion that Bud was entitled to assert a claim for declaratory and injunctive relief based on NLRA preemption.

CONCLUSION

For the foregoing reasons, ALRB's Petition should be denied.

Respectfully submitted,

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